IN THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF PITCAIRN ISLANDS

No. of 2004

BETWEEN

STEVENS RAYMOND CHRISTIAN	First Appellant
LEN CALVIN DAVIS BROWN	Second Appellant
LEN CARLISLE BROWN	Third Appellant
DENNIS RAY CHRISTIAN	Fourth Appellant
CARLISLE TERRY YOUNG	Fifth Appellant
RANDALL KAY CHRISTIAN	Sixth Appellant

A N D

THE QUEEN Respondent

CASE FOR STEVENS RAYMOND CHRISTIAN AND LEN CARLISLE BROWN

PETITIONERS' SOLICITORS:

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PART I - INTRODUCTION

CHARGES

The Appellants have been convicted in the Pitcairn Islands Supreme Court of the following:

(a) Stevens Raymond Christian

Charges
(i) Rape contrary to s7 of the Judicature Ordinance 1961 and s1 of the Sexual Offences Act 1956 (x4);
(ii) Rape contrary to s14 of the Judicature Ordinance 1970 of the Sexual Offences Act 1956.
Sentence
4 years imprisonment

(b) Len Carlisle Brown

Charges
Rape contrary to s7 of the Judicature Ordinance 1961, the Judicature Ordinance 1970, and s1 of the Sexual Offences Act 1956 (x2).
Sentence
2 years imprisonment with leave to apply for home detention

The sentences have been suspended and the Appellants remain on bail pending the determination of this appeal.

HUMAN RIGHTS

In relation to human rights issues, contrary to an earlier apparent concession by the Public Prosecutor that the Human Rights Act 1978 applied to the Pitcairn Islands, it would appear not to have been extended to them, at least in so far as the necessary protocols to the Convention have not been signed to enable Pitcairners to appear before the European Court: *R (Quark Fisheries Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] 3 WLR

837 **(Tab)**. In a statement to the Board on 31 October 2005, the Public Prosecutor accepted that English law reflected the principles embodied in statements of the European Court of Human Rights, and that this applied to the Pitcairn Islands. Submissions are advanced on this premise.

DISCLOSURE

As the Record demonstrates, there has been a considerable volume of disclosure and historical research. The respective Governors of the Pitcairn Islands have greatly facilitated this process.

In respect however of some requests, where the disclosure would have consisted of legal advice, privilege has been claimed by the Governors. In particular, privilege has been claimed in respect of the following categories of documents:

(a) Certain correspondence from legal advisers, including the Pitcairn Islands Legal Adviser, Mr Treadwell;

(b) Information relating to the decision to proceed by way of the Pitcairn Island Public Prosecutor, that is to create a new prosecuting office rather than proceed by way of English prosecuting authority to consider the prosecution of indictable crime on Pitcairn;

(c) Information relating to the decision to proceed by way of judges appointed from New Zealand rather than England to try serious indictable English crimes.

The Governors were aware that the Public Defender had sighted some of the documents for which privilege is claimed (some of these documents have in fact been published on the internet). It has always been maintained by the Public Defender that some of those sighted documents, and no doubt others unsighted, would be helpful to the Board in determining the present issues. Notwithstanding the requests by the Public Defender for the Governors to waive privilege, it has been maintained.

GROUNDS OF APPEAL

I Jurisdiction:

Purported Application of the British Settlements Act

During the relevant time, the Pitcairn Islands did not fall within the definition of "British settlement" in the British Settlements Act 1887, and the Orders in Council made under that Act in relation to the Pitcairn Islands were accordingly *ultra vires*.

II Whether The Sexual Offences Act 1956 was Incorporated into the Laws of the Pitcairn Islands

(a) An inadequate phrase to communicate the incorporation of English Penal Law

The Appellants submit that the importation provisions of the Judicature Ordinances 1961 and 1970 did not adequately communicate to them, the fact that English criminal law applied to them.

(b) Uncertainty in the Phrases of Importation

The Appellants submit that the expressions "substance of the law" and “statutes of general application” which appear in the Judicature Ordinances 1961 and 1970 were uncertain phrases and did not identify the relevant penal law so as to incorporate English penal law into the law of the Pitcairn Islands. In the absence of an express statutory provision identifying what English penal statute applied to them or a judicial declaration, Pitcairners were not informed of the relevant penal law that applied to them. It is submitted that in the modern era, such phrases are an inadequate vehicle to incorporate penal law.

(c) Absence of an Appeal Right

It is submitted that the local circumstances did not allow for the incorporation of English penal law because there was no provision under Pitcairn Islands law for an appeal from conviction for an offence under the Sexual Offences Act 1956. At the relevant date at which the Judicature Ordinances 1961, and 1970 purported to incorporate English penal law, an Englishman would have had a general appeal right to the Court of Criminal Appeal. Provision for appeal from the Pitcairn Islands Supreme Court was not made until the Pitcairn Court of Appeal Order 2000.

It is further submitted that a defendant on trial in the Pitcairn Islands either at the time of the

passing of the relevant Ordinance purporting to import English penal law or at the time of an alleged offence would have been in a worse position than an Englishman facing charges under the Sexual Offences Act 1956 and thus local circumstances precluded the importation of the Sexual Offences Act 1956.

III Abuse of Process

The Appellants submit that there were serious deficiencies in the administration of criminal justice on the Pitcairn Islands prior to these offences being prosecuted. The Sexual Offences Act 1956 was never published on the Pitcairn Islands. This alone or combined with the absence of any British police presence on the Pitcairn Islands, inadequate provision for local policing and administration of local Island crime, and the late constitution of the machinery of justice after the decision was taken to prosecute ("the promulgation and late constitution issues") meant that Pitcairners were not adequately forewarned that they were liable to prosecution under English penal law and what those offences and penalties were. Further, it is submitted that the late constitution of the machinery of justice compromised the appearance of even-handed justice, and caused unreasonable delay in the charging of the Appellants. In the face of these deficiencies, the prosecutions constitute an abuse of process, a denial of justice and/or are unfair under s6 of the Human Rights Act 1998.

(a) The Failure to Publish The Sexual Offences Act 1956

The Pitcairn Islands Supreme Court found that the Sexual Offences Act 1956 was never published in the Pitcairn Islands. The Ordinances were regularly promulgated by sending them to the Island Secretary for publication on the Notice Board at Adamstown, (and no objection is taken as to their promulgation in that regard). The Appellants submit that because the provisions of the Sexual Offences Act 1956 were never published on the Island, the Rule of Law was not complied with. As a consequence, the Appellants should not have been prosecuted for alleged violations of English criminal law.

(b) Absence of a British Police Presence and Deficient Local Policing and Administration

The failure to publish English criminal law was further compounded by an absence of a British police presence on the Pitcairn Islands and deficient local policing and administration. Successive administrators of the Pitcairn Islands had not sought to have any British police placed on the Pitcairn Islands until the arrival of Kent Police in or about 1996. The only police presence has been Island police who were responsible for prosecuting Pitcairn Island local law before the Island Court. The evidence suggests that after 1971 the Pitcairn Island Court may have fallen into desuetude,

so that there was no enforcement of penal laws on the Island for many years until the present proceedings.

The situation that had pertained for so many years on Pitcairn Island wherein only Island law and local crimes had been investigated and prosecuted by local Island police and the local Island court magistrate, contrasts with the present situation. Since 1996, there has existed a considerable British police presence on Pitcairn Island both in the form of investigating officers from Kent Police and members of the Ministry of Defence police. The Appellants submit that the absence of an British Police presence on the Pitcairn Islands meant that there was no practical demonstration of an intention to enforce English penal law on the Pitcairn Islands until recent times. This deficiency meant it was not practically foreseeable that Islanders would be prosecuted for sexual offending under English law.

(c) <u>The Late Constitution of the Machinery of Justice</u>

(i) <u>Inadequate notice of an intention to prosecute</u>

There has been, by the late constitution of the machinery of justice and legal system, inadequate advance notice given to Pitcairners that the

machinery to prosecute serious crimes under English law existed, and thus an intention to prosecute English criminal law plainly demonstrated. This further compounded the deficiency created by the failure to publish English law and provide a British police presence.

(ii) Compromising the appearance of even-handed justice

The effect of the late constitution of the machinery of justice, including the passing of a large number of Ordinances to accommodate these trials, extradition procedures to Papakura, New Zealand, and the construction of a prison by Islanders on the Island, during the currency of these proceedings has compromised the appearance of even-handed justice, and/or some legislative acts were in the nature of legislative judgments.

(iii) Delay

There has been an unacceptable delay between the dates upon which the Appellants were given notice that they were being seriously investigated and that immediate consideration was being given to the possibility of a prosecution, and the disposal of these proceedings that violate Article 6(1). The substance of the complaint is the

serious length of time that elapsed between the date the Public Prosecutor had determined on charges to the time he laid those charges. This was a period of approximately 14 months during which, for most of that time, the Appellants were aware that the Public Prosecutor had determined that prosecutions would be initiated. He would not say who would be charged or what charges were to be laid until procedures were finalised for venue and other steps associated with the implementation of a legal system were taken. This delay is not attributable to the conduct of the Appellants, but attributable to admitted systemic deficiencies in the administration of criminal justice on Pitcairn Island over many years.

The Appellants submission is that they have been under scrutiny, investigation and prosecution since the arrival of Kent Police in about 1996. The focus has been intense given the popular mystique that surrounds the Pitcairn Islands, the small size of the Island with its inter-related and close knit population and community, and in respect of some of the Appellants the leading roles or positions they have

held on the Island at the time of the investigation and prosecution.

(d) The invalidity of the importation of the machinery of justice and a legal system that in substance was taken from New Zealand

It is submitted that the steps taken by the Governor to import substantially the machinery of prosecution and adjudication from New Zealand, supported by a large number of Ordinances incorporating New Zealand criminal procedures such as the Sentencing Ordinance was an abuse of powers of governance. In substance, it is submitted that there was a delegation of responsibility for prosecution, trial and adjudication to a New Zealand legal system. It is submitted this was an abdication of judicial responsibility by a sovereign authority to whom arguably Pitcairners had submitted in 1838.

FURTHER LEAVE

Further leave is sought on behalf of the First Appellant; Stevens Raymond Christian:

Definition of Rape:

Prior to its amendment in 1976 did the prosecution under the Sexual Offences Act 1956 have to prove beyond a reasonable doubt as an essential ingredient of the offence of rape, that the defendant used force or threatened force and, in the absence of

this, that the complainant demonstrated resistance? Alternatively was it sufficient that the prosecution proved beyond a reasonable doubt that the complainant had not consented and the defendant had no honest belief that she was consenting?

PART II - BACKGROUND

Geography

1. The Pitcairn Islands ("Pitcairn") comprise Pitcairn Island and three uninhabited atolls, Henderson, Ducie and Oeno. They lie in the Pacific Ocean approximately half way between the Panama Canal and New Zealand. The nearest inhabited island is Mangareva, which is part of French Polynesia, approximately 300 miles (480 kilometres) away.

2. Pitcairn is a small rugged volcanic island 2 miles long by 1 mile wide with an area of 1120 acres (450 hectares) approximately two and a half times the size of Hyde Park. The highest point rises to over a thousand feet and only 8% (90 acres) of the total surface is flat or flattish. Most of the Island is for practical purposes inaccessible. Pitcairn's coast is cliff-lined nearly the entire perimeter making access precipitous and difficult. The only established landing is Bounty Bay.

Mutiny

3. On 23 December 1787 the *HMAV Bounty* under the

command of William Bligh left Spithead for Tahiti with instructions to collect breadfruit seedlings to take to the West Indies for the cultivation as food for slaves. On 26 October 1788, the *HMAV Bounty* after a difficult voyage finally arrived off Tahiti. On 28 April 1789, three weeks after leaving Tahiti, Fletcher Christian and some of the ship's crew mutinied setting Bligh and 18 of his loyal crew adrift in an open boat. Bligh and most of his men made it back to England. Fletcher Christian, after unsuccessfully attempting to settle on the island of Tubuai, near Tahiti, returned to Tahiti. Sixteen of the crew remained in Tahiti and eight decided to stay with Fletcher Christian in their search for an uninhabited island. Eventually, 6 Polynesian men and 12 Polynesian women accompanied the mutineers to Pitcairn. The mutineers sighted Pitcairn on 15 January 1790. The HMAV *Bounty* was anchored off what is now known as Bounty Bay and the livestock and goods were shipped to shore. On 23 January 1790, the ship was run ashore, burned and sank. That day is still celebrated as Bounty Day with the symbolic burning of a model ship.

Population

4. The population of Pitcairn has fluctuated. In 1808, when Captain Folger of the American sealing ship *Topaz* rediscovered Pitcairn, the population was 35. By March 1831 when the Pitcairners moved to Tahiti for a short time, the population had risen to 86. At the time of the visit of Captain Eliott in HMS *Fly* in 1838, the population was 99. In 1856, the entire

population of 194 was relocated to Norfolk Island. In 1859, the first group of 16 Pitcairners returned. From then the population grew to a peak of 200 in 1936 and since has been in steady decline. This century the permanent population has not exceeded 50.

Shipping

5. The history of Pitcairn may be chartered by the visits of ships. Initially, these visits were whalers and merchant ships, with occasional visits from the Royal Navy. Regular Naval visits ceased at the turn of the 20th Century. Since the opening of the Panama Canal in 1914, Pitcairn has been on the shipping route to New Zealand. Merchant ships and later, container ships used to stop en route to trade supplies for curios, fresh fruit and fish. More recently, liners and cruise ships have called. Until cruise ships made Pitcairn a destination, the visits were unscheduled and subject to weather. The visits were normally a matter of hours and, in most cases, nobody left the ship. There has never been a regular shipping service to the Island although there have been supply visits 3 or 4 times a year. Often the ship could not stop because of weather and the supplies would have to have been sent on a later voyage.

6. The Island has no deepwater harbour. Visiting vessels anchor off Pitcairn and access is by Island longboat. After gifts of whaleboats in 1819 and 1880, Pitcairners built their own longboats. Motors began to replace oarsman in the late 1930s. The little Pitcairn fleet has ranged from a high of six boats

in the 1920s to rare occasions when only one boat was operating. At present, there are two. The first of the Islands' aluminium boats arrived in 1983. Traditionally, working on the longboats has been a rite of passage for young men on the Island and even today, the launching of a longboat is a significant event. There have been a number of serious accidents and a number of acts of valour associated with them.

Transportation

7. Prior to 1964, there were no vehicles on the Island. The only form of transport was the traditional wheelbarrow which had been developed for Pitcairn conditions in the 19th century. In 1965, two tractors were introduced and the Islanders used them to convert the narrow tracks into small dirt roads. In 1966, two Islanders purchased Honda 90 trail bikes. By the mid 1970's, there were a number of like motorcycles and 3 Minimokes in use. In 1983, a bulldozer was air dropped onto Pitcairn. By 2000, most of the two wheel bikes had been replaced by 3 and then 4-wheel bikes which are now the standard transport on the Island. In 2005, work began concreting the steep road leading from The Landing to The Edge, known as “The Hill of Difficulty”. The road is now being extended from The Edge to the village of Adamstown. There is no landing strip on Pitcairn.

Communications

8. Until 1921, visual communication with passing ships was by lamp. A donation was made of a crystal receiver to the Island in 1922. In 1952, short wave facilities were introduced and the station was re-built in 1962. Until April 1969, regular telegraphic schedules were handled twice daily (except Saturdays) with Rarotonga and between 1969 and mid 1985 through Suva. In June 1985, overseas telephone service was introduced for the first time to Pitcairn. This was by way of radio-telephone service via Wellington and operated on twice daily schedules only. In June 1992, satellite telephone and facsimile communication was introduced. The cost of phone calls increased from NZ$0.70 per minute to NZ$15 per minute. In 1998, a new system was installed at the cost of NZ$7.50 per minute. Communications throughout the Island are by ship radio. Pitcairn receives no newspaper, radio or television services.

Education

9. Historically education began on Island when one of the mutineers, John Adams, began teaching the first generation of children to read in the 1800's. This tradition was carried on by others until the last decade of the century when the school came under the guidance of the Seventh Day Adventist Church. Between 1917 and 1938, education was left to the Islanders. In 1948, the Government formally assumed responsibility, although education had been compulsory since 1838. A school house and

teacher's residence was completed in 1950 and since then, visiting teachers have been appointed usually on a 2 year contract.

Medical

10. There was no resident doctor on the Island until 2000, nor was there a nurse until 1944 when a Seventh Day Adventist trained nurse became the first resident nurse. It then became the usual practice for the wife of the resident pastor to be a trained nurse, or in some cases the pastor himself. Occasionally, the assistance of medical officers or dental surgeons on passing ships has been sought.

Criminal Legal System

11. The history and development of the criminal legal system is contained in the submissions and material before the Court. With the notable exception of the murder trial and subsequent hanging of Harry Christian in 1898, there appears to have been no prosecution for criminal offences under English law prior to this investigation.

12. The first record of local written laws was by Waldegrave in 1829. The community developed, with the assistance of various visiting Royal Naval Officers, over the 19th Century, a system of other laws. In the 20th Century, other local laws have been re-written and introduced. Prior to 1999, the last recorded criminal case prosecuted on Pitcairn under Island law appears to be in 1971 or 1972 and

the last recorded sexual offence prosecution under Island law appears to be in 1962.

13. The Supreme Court found that until 1997 when a set of *Halsbury's Laws of England* was sent to the Island, there had never been a copy of the Sexual Offences Act 1956 on Pitcairn. There is no record of any English statute or English criminal textbook being on the Island before that date. There is no record of a Judge, independent lawyer or off-island police officer visiting Pitcairn until 1997. The last visit by a Pitcairn legal adviser was Mr McLoughlin in 1958. His successor, Mr Paul Treadwell, who was appointed in 1979, has never visited the Island.

Operation Unique

14. In 1996, there was a complaint of an alleged attempted rape by an Islander. The Kent Police were instructed to investigate and sent Superintendent Dennis McGookin and Detective Inspector Peter George to the Island. They were appointed as Pitcairn police officers. Ultimately, there was no prosecution.

15. In 1997, following arrangements between the Foreign and Commonwealth Office and the Kent Police, Constable Gail Cox of the Kent Police was appointed a Pitcairn police officer. In December 1999, while Constable Cox was on the Island, the education officer reported possible incidents of rape. This lead ultimately to the present investigation. This was named "Operation Unique". It was aptly named.

16. The investigation was conducted by Detective Inspector Rob Vinson and Detective Inspector George of the Kent Police with later assistance from Senior Constable Karen Vaughan from New Zealand. The Appellants were interviewed between April 2000 and March 2001. In April 2002, the Public Prosecutor advised the Pitcairners that he had decided what charges to lay, but could not do so because the question of venue had not been finalised. Charges were ultimately laid in April 2003 and trials commenced on 29 September 2004. Special Leave was granted on 11 October 2004.

17. In a separate incident in December 1999, Ricky Quinn, a visitor to the Island, was investigated and subsequently charged under Island law with unlawful carnal knowledge and indecent behaviour. He pleaded guilty to the unlawful canal knowledge charge and the other charge was withdrawn. He was convicted and sentenced to 100 days imprisonment, and deported shortly after conviction. Subsequently, documentation disclosed that the Administration had doubts about whether Quinn had in fact committed an offence. This was ultimately resolved in 2006 when the Governor pardoned Quinn.

Developments since Operation Unique

18. There have been a number of developments since the commencement of Operation Unique. The most salient being:

(a) Ordinances

Prior: The first Ordinance was introduced at the time of the Pitcairn Order in Council 1952. There were subsequently Judicature Ordinances in 1961 and 1970, a Justice Ordinance in 1966 and four amending Ordinances in 1968, 1970, 1971 and 1972.

Post: Since 1999 there have been over 50 Ordinances passed which have effectively introduced the machinery of justice relating to criminal trials, covering topics from appointment of personnel and court procedure to care of children.

(b) Judges and Magistrates

Prior: There were no Judges or off-island Magistrates appointed.

Post: There are now a Chief Justice, Court of Appeal Judges, Supreme Court Judges and Magistrates appointed.

(c) Lawyers

Prior: There were no Pitcairn lawyers.

Post: Now there are 16 lawyers admitted to the Pitcairn Bar.

(d) Statutes and Legal Texts

Prior: There were no copies of any English criminal statutes or textbooks on the Island.

Post: There is now a copy of *Halsbury's* 4th Edition (without updates).

(e) Policing

Prior: There were only unqualified and untrained local police officers. There is no evidence that any local police officer since the 1960s had any training (two of the last three Pitcairn police officers have been charged in the course of this enquiry).

Post: Since 1999, there have been visits by the Kent Constabulary. Since 2001, two Ministry of Defence police officers from Scotland have been stationed on the Island on a 3-month rotation.

(f) Governor's Representative

Prior: Since 1951, the overseas based schoolteachers had been appointed as part of their duties, the "Governor's Adviser". They had no executive function on the Island on behalf of the British government but reported directly to the Governor on council meetings, public meetings and other matters which may have been of interest to him.

Post: Since 1999 there has been a permanent Governor's representation from the Foreign Commonwealth Office who is a career diplomat.

(g) Social Workers

Prior: There were no social workers.

Post: Two social workers are now permanently on the Island on rotation.

(h) Medical

Prior: There was no doctor. Since the 1960s, the Pastor or his wife had nursing qualifications.

Post: There is now a permanent doctor on rotation.

(i) Shipping

Prior: There was no scheduled shipping.

Post: There are now regular charter ships bringing supplies from Auckland and transporting officials and occasionally locals to and from French Polynesia so that they can fly to their destinations.

PART III - JURISDICTION

GROUND I - PURPORTED APPLICATION OF THE BRITISH SETTLEMENTS ACTS 1887 & 1945

PROPOSITION

19. Central to the Public Prosecutor's submissions on jurisdiction in the Courts below was the British Settlements Act 1887, later amended by the British Settlements Act 1945 ("the British Settlements Act") **(Tab)**. The basis of constitutional authority upon which the Public Prosecutor claimed jurisdiction was the fact that Pitcairn was a British settlement within the definition of the Act and it was lawful therefore, for the Crown to pass Orders in Council and Ordinances for the peace, order and good government of Pitcairn pursuant to the British Settlements Act.

20. The Appellants submit to the contrary that Pitcairn was not a British settlement as defined by the British Settlements Act.

THE BRITISH SETTLEMENTS ACT

21. The British Settlements Act enabled the Crown to provide for the government of territories in which British subjects had settled but which were not under the authority of a civilized government. That much is gained from the preamble.

22. The principal purpose and effect of the 1843 Act was to alter the common law rule that, in a colony

acquired by settlement, the Crown can set up a constitution but cannot enact legislation of other kinds.

23. The British Settlements Act 1887 repealed the Acts of 1843 and 1860 and re-enacted them, with amendments which made little change of substance. The British Settlements Act 1945 amended the Act of 1887 so as to overcome difficulties which arose under section 3 of that Act. The amendments were in two respects. First, the reference to an instrument under the Great Seal included a reference to an Order in Council and secondly, for the reference to any three or more persons within the settlement, there is substituted a reference to any specified person or persons or authority: Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, London, Stevens & Son 1966 at p166-168 **(Tab)**.

24. Section 2 of the British Settlements Act empowers the Queen in Council:

> To establish all such laws and institutions and constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlement.

25. Critical to the jurisdiction argument was the statutory definition of a British settlement under the Act. This was defined in Section 6 as being **(Tab)**:

> … any British possession which has not been acquired by cession or conquest, and is not for the time being within

> the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act, or of any Act repealed by this Act of any British possession.

26. There was no specific legislation passed by the Imperial Parliament providing for the governance of Pitcairn.

27. The Appellants accept that the Court of Appeal correctly identified the Public Defender's submissions:

(a) The British Settlements Acts 1887 and 1945 had no application to Pitcairn.

(b) Because the Orders in Council purported to be made under those Acts as subordinate legislation, they had no lawful basis, with the consequence that all Ordinances made under them were also invalid.

(c) The inclusion in 1898 of Pitcairn Island in the earlier 1893 Pacific Order in Council was invalid for the same reason.

28. The Appellants submit that the Court of Appeal erred in finding:

(a) On the facts, Pitcairn was a British possession acquired by settlement.

(b) The Orders in Council 1952 and 1970 were acts of State that were immune from any

judicial review and conclusive as to the status of Pitcairn.

(c) Categorisation of a colony cannot be disturbed once made by practice.

29. The Supreme Court had agreed with the Public Prosecutor's argument that Pitcairn was a British settlement under the Acts for the following reasons:

> We consider there to be several ways in which Pitcairn Island could be recognised as a British settlement or possession: it was not acquired by cession or conquest; it was not for the time being within the jurisdiction of the Legislature; there were no indigenous Islanders; settlement was by British subjects; a chain of British connection existed over time; and there was expressed and actual loyalty to the British Crown. There is yet another reason, which is that Pitcairn is a British settlement or possession because the Executive has by Orders in Council told us so.

30. This view was subsequently upheld in the Court of Appeal.

31. At the hearing before the Supreme Court, the Public Defender, conceded that cession as at 1838 was not in issue. This concession is now withdrawn.

32. The primary argument for the Appellants in this Court is that, if Pitcairn did become a British possession in 1838 with the arrival and involvement of Captain Eliott of the HMS *Fly*, which on any view of the history of Pitcairn would seem to be an important date, then possession was derived by voluntary cession of the inhabitants of Pitcairn to the British Sovereign. Accordingly, it is submitted that Pitcairn

could not be a British settlement as defined by the British Settlements Act. Such statutory instruments and Ordinances that purport to have been made under the powers delegated under these Acts are invalid, and more particularly, so are those Orders in Council and Ordinances that govern these proceedings.

33. The concession was made without appropriate consideration of *Sammut v Strickland* [1938] AC 678 at p699 **(Tab)** and the opinion of the Privy Council that cession could include not only a formal cession by a government of part of its territory to another, but a voluntary cession of the inhabitants of a territory to another:

> … the word "cession" is employed by the respondent in this connection in a limited sense so as to exclude a voluntary cession by the general consent of the people. This involves the division of ceded territories into two classes, those acquired by an act of cession from some sovereign power and those ceded by the general consent or desire of the inhabitants. Their Lordships must observe that there seems to be no authority in any case or recognised text-book on constitutional law for this distinction.

The issue of voluntary cession is further developed in later argument.

34. The submission is made that consistently with the view Pitcairners have of their own history, there was in 1838 a submission to the British sovereign by the leading inhabitants of Pitcairn which amounted to a voluntary cession in law. By that time, Pitcairn was it is submitted a community of independent minded persons largely made up of descendants of the

mutineers and Tahitian women and a community of whom the inhabitants for the most part owed no allegiance to Great Britain.

35. In a draft letter to the Pitcairn Public Prosecutor dated October 2000, Governor Williams described the relationship between the United Kingdom and Pitcairn:

> The island has been a UK dependent territory since 1839, although the precise relationship has been redefined several times. In all that time, there has never been a resident Governor or other figure representing the UK's governmental authority.

ACT OF STATE

36. The Public Prosecutor contended in the Supreme Court that the categorisation of Pitcairn as a British settlement was immune from legal challenge. His principal argument was that the chain of authority for all laws in Pitcairn derived ultimately from the British Settlements Act. There was simply no need to examine history or to trace the development of the Island community. The statutes were the starting point followed by the Orders in Council and ultimately the local Pitcairn Ordinances.

> Two different types of act of State were examined. First, the acts of the British in settling Pitcairn as a colony. Secondly, the acts of State, in a literal sense, enacted by the Sovereign for the governance of Pitcairn. The Orders of 1952 & 1970 were contended to be in the latter category and, as such, beyond challenge by the courts. The former type of act of State, it was conceded orally, can in some circumstances be challenged, but the concept of Parliamentary supremacy makes the legislative type beyond reproach.

37. If this argument is correct, then an historical analysis of the relationship of Pitcairn and Britain from the arrival of the mutineers in 1790 to 1952 is unnecessary. The Appellants however, submit that immunity from review derived from act of State is not applicable to the circumstances of this case and that legal issues of jurisdiction upon which the validity of Orders in Council are founded are for the Courts to determine.

38. The Public Prosecutor also submitted consequently that all Pitcairn Ordinances were valid, being made pursuant to the Orders in Council of 1952 and 1970, and submitted that the test for validity of subordinate legislation passed under a general power to legislate for the "peace, order and good government" of a territory affords considerable deference to the legislator.

39. It was said in *R v Burah* (1878) 3 AC 889 at p904-905 **(Tab)**:

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited … it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

40. Reference was made by the Public Prosecutor to a number of other decisions on the act of State doctrine. The doctrine was applied in the High Court of Australia in *Coe v Commonwealth* (1979) 24 ALR 118 **(Tab)**, by Gibbs J, who said:

> The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged.

41. In *Sobhuza v Miller* [1926] AC 518 at p523 and 525 **(Tab)**, the Privy Council said:

> In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to [as] an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890 …
>
> In the *Southern Rhodesia case* Lord Sumner … held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. [This implies] that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be … in law unquestionable.

42. In *Nyali v Attorney-General* [1956] 1 QB 1 at p15 **(Tab)**, Denning LJ observed:

> The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus if an Order in Council is made affecting the protectorate, the courts will accept its validity without question: see *Sobhuza II v Miller* and others. If follows, therefore, that in this case we must look not at the agreement with the Sultan, but at the Orders in Council and other acts of the Crown so as to see what

> jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown's jurisdiction. I turn, therefore, to consider them.
>
> In the first place there is an Order in Council of 1920, which has brought the Kenya Protectorate very much within the orbit of Kenya Colony. The governor of the colony is also the governor of the protectorate and is entitled to all the powers of the Crown therein. The executive council of the colony is also the executive council of the protectorate. The legislative council of the colony legislates, not only for the colony, but also for peace, order and good government of the protectorate. And so forth. None of those provisions can be challenged in the courts.

43. Lord Justice Atkin, in *The Fagernes* [1927] at p311 **(Tab)**, observed:

> What is the territory of the Crown is a matter of which the Court takes judicial notice … Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country.

44. In *Post Office v Estuary Radio* [1968] 2 QB 740 at 755 **(Tab)**, Lord Diplock said:

> It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required. The Queen's courts, upon being informed by Order in Council or by the appropriate Minister or Law Officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it:

45. The Supreme Court observed having considered these authorities there could be no doubt that the Orders in Council made in 1952 and 1970 were acts

of State in their own right. It was said that it was likely also, as contemplated by *Nyali v Attorney-General*, that there were other acts of the Crown at various times in Pitcairn's history which can be called acts of State, going back to Captain Eliott and the HMS *Fly* in 1838, having similar effect.

46. The Supreme Court observed:

> We are further entitled to consider this same question on legal bases other than matters historical. The weight of precedent enjoins us not to conduct a review of history as a suitable path to decision, but to accept obediently the acts of the Crown (known as acts of State) of both an Executive and Legislative kind which claim Pitcairn to be a British territory, and its population as British subjects or persons subject to British laws … Based on the reality of the longstanding legislation, Orders in Council and Executive acts done for over a century, we reach the same conclusion.

47. The Court of Appeal made as a primary finding of law that the assertion by the Crown of jurisdiction over a territory is an act of State that was not susceptible to challenge.

48. *Halsbury* 4th Ed, para 613 **(Tab)** defines act of State as:

> An act of state is a prerogative act of policy in the field of foreign affairs performed by the Crown in the course of its relationship with another state or its subjects. Typical acts of state are the making and performance of treaties, the annexation of foreign territory, the seizure of lands or goods in right of conquest, declarations of war, and of blockade. The detention of an enemy alien in wartime or his deportation may be regarded as an act of state.

49. Further, *Halsbury* at para 618 **(Tab)** asserts that:

> In general there can be no act of state with respect to a British subject.

50. It is submitted that the Pitcairn Orders 1952 and 1970 are not acts of State. They are merely instruments reciting the Crown's powers to make laws for the governance of Pitcairn. They do not seek to assert sovereignty over Pitcairn as a foreign entity. They purport to govern people who already owe allegiance to the Crown. If Pitcairn became a British possession in 1838, then it must also follow that Pitcairners were British subjects and thus acts of State cannot be pleaded by the Public Prosecutor as leading to immunity from judicial review.

51. The Law Advisers in relation to Harry Christian and the procedure that could be adopted for his trial for murder on Pitcairn in 1898 were of the opinion that he could be tried for murder if taken to England with witnesses under the provisions of section 9 of 24 and 25 Vict. Cap 100.

52. This could only have occurred if Harry Christian was a British subject because section 9 **(Tab)** provided:

> Where any Murder or Manslaughter shall be committed on Land out of the United Kingdom, whether within the Queen's Dominions or without, and whether the Person killed were a Subject of Her Majesty or not, every Offence committed by any Subject of Her Majesty, in respect of any such Case, whether the same shall amount to the Offence of Murder or of Manslaughter, or of being accessory to Murder or Manslaughter, may be dealt with, inquired of, tried, determined, and punished in any County or Place in *England* or *Ireland* in which such Person shall be apprehended or be in Custody, in the same Manner in all respects as if such Offence had been actually

> committed in that County or Place; provided that nothing herein contained shall prevent any Person from being tried in any Place out of *England* or *Ireland* for any Murder or Manslaughter committed out of *England* or *Ireland*, in the same Manner as such Person might have been tried before the passing of this Act.

53. The Appellants in any event submit that the issue of whether Pitcairn was a British settlement under the British Settlements Act and the powers of governance were justiciable issues. Unless Pitcairn came within the definition of a British settlement under the Act, no Orders in Council could be validly passed on the basis of this premise. It is submitted, in this regard, that it is for the courts to determine whether the statutory grounds were satisfied which founded a basis for the Pitcairn Orders 1952 and 1970. The act of State doctrine (however widely viewed) cannot preclude the courts examining whether the conditions precedent to and upon which the executive asserts its powers to act have been satisfied.

54. It is submitted that modern administrative law would sanction judicial review of issues such as these *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 **(Tab)**; *The Queen on the Application of Louis Olivier Bancoult v The Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 **(Tab)**; *C.C.SU v Minister for Civil Service* [1985] 1 AC 374 **(Tab)**.

55. The Appellants' submission is that the jurisdictional basis upon which Orders in Council such as the present are made is a justiciable issue. This point is

made in *Sammut v Strickland* where the Privy Council embarked on a consideration as to whether Malta had been ceded to Britain or was settled under the provisions of the British Settlements Act because certain legal consequences flowed from such a finding.

56. In *R (Bancoult) v Secretary for State for Sovereign and Commonwealth Affairs* [2001] QB 1067 **(Tab)**, similarly the Court of Appeal embarked on a consideration of whether a certain Ordinance purporting to relocate the people of the Chagos Islands made under the British Indian Ocean Territory Order 1965 was a valid exercise of power. This review could not have been undertaken if the delegation and or the order had been regarded as an act of State and immune from review. Indeed, the orders were purportedly passed for the good government of the people in question, similarly with the ordinances made in relation to the Pitcairn.

57. If in fact, the foundation is not met then the Crown has acted beyond its powers, and to that extent it is submitted that the validity of Orders in Council of the kind in issue here may be reviewed in the courts. It may be otherwise where the Order in Council is not based upon the existence of a jurisdictional fact that gives rise to a power under enabling legislation, and is an assertion as to sovereignty. In that case, an assertion to sovereignty by Order in Council may amount to a non-justiciable act of State: *Post Office v Estuary Radio Ltd*.

CATEGORISATION, PRACTICE AND JUDICIAL REVIEW

58. Associated with the issue of act of State and immunity from judicial review, is the issue of categorisation in practice. The Court of Appeal considered this as a further reason for not acceding to the Public Defender's submission that it could not be contended that Pitcairn was a British settlement under the British Settlements Act. The Court observed:

> As Halsbury notes categorisation of a colony cannot be disturbed once made by practice. The "practice" of categorising Pitcairn as a settled colony goes back at least to the 1898 Instruction issued under the 1893 Order in Council. It was restated in different forms many times subsequently, as we have earlier discussed. There was ample evidence of the "practice".

59. It is submitted that, contrary to the approach asserted by *Halsbury*, as to categorisation, the issue of whether Pitcairn was a British settlement within the definition of the British Settlements Act was a matter that was justiciable. It has never, in an English court, been judicially determined that Pitcairn was in fact a British settlement, and as a consequence the Crown had powers to govern pursuant to that Act.

WAS PITCAIRN A BRITISH SETTLEMENT?

60. This question involves two issues. First, was Pitcairn a settlement derived from the British nationality of the mutineers, that is a settlement at common law? Secondly, if not, was it a settlement within the

definition of British settlement under the British Settlements Act?

61. Before considering these issues, it is important to explore Pitcairn history between the arrival of the HMAV *Bounty* and the arrival of Captain Eliott of HMS *Fly* in 1838. **(Crown Chronology paras 1-20)**

A BRITISH SETTLEMENT DERIVED FROM THE NATIONALITY OF THE MUTINEERS/COMMON LAW SETTLEMENT

62. Up to the arrival of the HMS *Fly* in 1838, the Appellants submit that Pitcairn was not a British settlement in the *Blackstone* or common law sense of a settlement derived from the nationality of its settlers. See Blackstone, Commentaries, *The Laws of England*, (1 Comm.107), cited by Lord Watson in *Cooper v Stuart* 14 HL 286 at 287 **(Tab)**. Blackstone wrote:

> It hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk, 411, 666) But this must be understood with very many and very great restrictions.

63. In *Halsbury*, 2nd Ed, 1933 vol xi para 11 **(Tab)**, it was said that:

> Settlement may take various forms. Occupation of the territory may be authorised by the Crown, possession taken in the King's name, and settlers introduced. Such is the case with Australian colonies, British North America excluding Ontario, Quebec, Newfoundland, and in the West Indies, the Leeward Islands, Bahamas, Barbados

> and Bermuda. The Falkland Islands and the Gold Coast, Sierra Leone, and even the Gambia may fall into this category. Secondly, the Crown may recognise as a British territory settlements made by British subjects without previous authority. British Honduras, Pitcairn Island and Tristan da Cunha are examples and there was a considerable settlement in New Zealand before it was annexed to the Crown. Lastly, islands which are uninhabited, or arctic areas unfit for habitation, may be formally declared to be annexed, as in the case of many small islets in the Pacific, the islands north of Canada, the dependencies of the Falkland Islands and the Ross dependency of New Zealand. In such cases annexation is effected by a formal declaration of taking possession, authorised or ratified by the Crown, and the hoisting of the British flag.

64. The mutineers, whilst owing allegiance to England by reason of their nationality which they could not divest themselves of: *Joyce v Director of Public Prosecutions* [1946] AC 347 **(Tab)**, did not travel alone to Pitcairn but were accompanied by both Polynesian men and women. It was manifestly not their intention to create a British settlement. They sought a refuge away from capture and prosecution for their actions. To assert that this small community of people of mixed race constituted a British settlement in these circumstances, it is submitted, is a fiction.

65. The women, the mutineers co-habited with, were Tahitian and from these relationships, children were born. The children were not English. They were illegitimate children in the eyes of English law.

66. The submission is that the settlement of Pitcairn was anomalous in 1790. It did not fit into the concept of a common law British settlement in any true sense,

that is where British settlers go out from their native country either with consent or without, to found a place to live. It was exceptional because it was the product of both British and Tahitian settlement with the British men being felons seeking to avoid contact with Britain.

67. The relationship of citizen and Sovereign is one of reciprocity of obligation: *Joyce v DPP*, p370 **(Tab)**. It is submitted the treasonous acts of the mutineers had to this extent absolved the Crown of any obligation to extend its protection to the mutineers in any new land. If that is the case then the Blackstone thesis of nationality following a British settler cannot extend to Pitcairn.

68. It is submitted the common law as defined by *Blackstone* applies only to the importation of English law as applicable to settlements that have been created by English settlers exclusively, that is British subjects and not in circumstances where there was mixed settlement, as here.

69. In any event, *Blackstone's* thesis is based on an obiter dictum found in 2 *Salk* 356, at 357 **(Tab)** and there did not seem to be any lengthy argument on point:

> 1st, In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed.

70. That was as much as seemed to be considered in the case *2 Salk* 356 on English law and settlement.

That case in fact turned on conquest and the application of English law in a conquered country, Jamaica. It is submitted it is a very significant step to argue from the proposition that English law followed English men to an uninhabited territory to a proposition that English law governed a settlement created by both English men and in this case Polynesian men and women and defined the status of that settlement as a British settlement at common law. An even greater step, it is submitted is to suggest this where the English men were seeking a refuge from the arm of English law.

71. Neither *Blackstone's* thesis nor the foundation for his proposition contained in 2 *Salk* 356, 357 extended to a mixed settlement such as this still less one that had been formed in circumstances of mutiny and overt rejection of English authority. In this sense, the settlement of Pitcairn can be truly described as unique.

NATIONALITY ISSUES

72. An issue of preliminary importance to the status of Pitcairn as at 1838 with the visit of HMS *Fly* is the composition of the population as at that date. The Supreme Court observed:

> The Defender's contention that, when John Adams died in 1829, any link with the British Crown ceased, overlooks that by that date other British subjects - namely Buffett, Evans and Nobbs - had already taken up residence on the Island. They were British subjects and remained so throughout their lives. Accordingly, notwithstanding the birth of illegitimate children, the death of John Adams did

not achieve complete severance of the Islanders from the British Crown. This aspect renders it unnecessary for us to declare the nationality status of the illegitimate children. The argument relates to whether there was a break in British settlement on the death of John Adams. The arrival of British subjects Buffett, Evans and Nobbs to form a significant numerical membership of this tiny community ensured there was no such break.

73. The Appellants submit of importance so far as the issue of settlement is concerned is the status of the 24 children born to the mutineers and their Tahitian partners. No children were born of the union of any of the Polynesian men and Tahitian women on Pitcairn Island, it seems. These 24 children who survived the death of their fathers within a few years of the mutineers arrival in Pitcairn, formed the nucleus and genesis of all native-born Pitcairners thereafter.

74. Children born of unions between the mutineers and Tahitian women were not British subjects. They were illegitimate. Illegitimate children took the domicile of their mothers. *Halsbury*, 1st Ed, para 742 **(Tab)** until the child attained the age of 16 or acquired a settlement of his or her own. In any event, these children were the natural born children of men who were liable to be punished for having committed felonies under the law of the land in force at that time. By virtue of the statute of 4 Geo.2 c.21 s2 **(Tab)** these children lost all the rights, privileges and status as British subjects by birth because their fathers "were or shall be liable to the penalties of high treason or felony". Plainly, the mutineers were liable for such acts arising out of the mutiny and subsequent burning of the HMAV *Bounty*.

It is submitted that the arrival of three settlers of British descent, Buffet, Nobbs and Evans could not convert Pitcairn into a British settlement at common law either since their arrival was after the date of the settlement of Pitcairn by the mutineers and the Polynesians.

75. The reality is that by 1838 and the arrival of HMS *Fly*, an independent Pitcairn community existed which, albeit small in number, probably according to Eliott about 99 people had existed for almost 40 years and was very much a mixed blood community. Although that there are indications that Pitcairners had turned to British sources for assistance such as in relocating to Tahiti and sought to be recognised as a British possession, it is submitted that this does not mean that Pitcairn attained the status of British settlement on the arrival of the mutineers in 1790. Rather as time progressed, and after the death of Adams in 1829, events such as famine, the arrival of whalers in greater numbers, and perhaps the arrival of an uninvited opportunist Joshua Hill motivated the community to seek protection of the British Sovereign. Certainly, Captain Eliott did not view Pitcairn as anything other than an independent community when he visited in 1838.

76. Indeed, he expressed diffidence about extending the protection that Islanders had sought from the British Sovereign to Pitcairn. It was in 1838 at the initiative of the leading inhabitants of Pitcairn that the protection was sought by them of the Sovereign. That protection it is submitted had not extended to

Pitcairn by the mere fact of the arrival of the mutineers on Pitcairn in 1790. Captain Eliott's dispatch records the concerns of the Pitcairn community at the actions of whalers and seeking protection for the 99 inhabitants. It was precisely because they had been victimised by American vessels denying that they were under the protection of Great Britain, as they had neither colours, or written authority that Eliott decided to offer them the protection they desired and supplied them with the flag. This is further considered below.

THE ARRIVAL OF HMS *FLY*

77. Again it is important to consider history. The visit of HMS *Fly* followed the intervention of the Royal Navy, when a public enquiry was held abroad HMS *Actaeon* in 1837 into abusive exercise of self-proclaimed authority over other Islanders by a recent settler, Joshua Hill and his removal to Valparaiso by Captain Bruce of HMS *Imogene* in 1838.

78. The *Pitcairn Island Register* recorded the visit of Captain Eliott with the following entry:

> 1838
> November 29th Arrived H.M.S. *Fly* Russel Elliot Esq. with a present from the Revnd Mr. Rowlandson and congregation Valparaiso.
> Captain Elliots proposal for electing a chief Magistrate proceeded upon and Edward Quintal chosen and sworn in.

79. Brodie's published version of the *Register*, taken from his visit in 1850, contained the additional words:

This island was taken possession of by Capt. Elliot, on behalf of the Crown of Great Britain, on the 29th of November.

80. Captain Eliott's despatch records:

After a long passage I arrived at Pitcairn Island on the 29th of November, where I found this interesting community preserving their deservedly high character for exemplary morality, innocence and integrity, but they very earnestly represented to me the immediate necessity for their [sic] being some chief or head to their increasing community, amounting now to 99 souls, for their internal regulation and Government, but more especially to meet the difficulties and dangers which they had already experienced and been again threatened with by lawless strangers in Whale Ships, there having been cases of recent occurrence, where half the ruffian crew of a Whale Ship were on shore for a fortnight, during which they offered every insult to the inhabitants and threatened to violate any woman whose protectors they could overcome by force, occasioning the necessary concentration of the men's strength for the personal protection of the females, and thereby great damage to their Crops, which demanded their constant attention, taunting them that they had no laws, no country, no authority that they were to respect. American vessels denying they were under the protection of Great Britain, as they had neither colors, or written authority; I found them however with a Merchant Union Jack flying, procured from an English ship.

Apprehending that my duty required some decisive step in this unlooked for contingency I considered I should best afford protection to these people, and least involve my Government of whose intentions in respect to the Pitcairn Islanders I am ignorant, by conferring the stamp of Authority on their election of a Magistrate or Elder to be periodically chosen from amongst themselves [on the 1st of January each year], and answerable for his proceedings to Her Majesty's Government for whose information he is to keep a Journal.

I accordingly drew out a few hasty regulations to be observed, under my Authority in the election of this Officer marked No 6, which with a formal attestation of his being sworn in before me, and an [sic] Union Jack which I supplied them with, will I trust insure them against any renewed insults from Foreigners. By their unanimous voice, they selected for the situation Edward Quintal a much able and superior Senior of their number.

> I trust, Sir, you will consider my assumption of the power to confer this Authority was warranted by the urgency of circumstances and the difficulty of reference, and that you will be able to approve of the view I have taken of my duty; delaying only one day at Pitcairn, I hastened to Cobija [Bolivia] where I only arrived after a very protracted passage from easterly winds and calms, on the 10th January.

81. Captain Eliott duly drew up a Constitution and sanctioned a code of ten laws for the Island, dealing with such matters as a rudimentary legal system, the control of animals, trading with ships, landmarks and an enlightened law for compulsory education up to the age of 16. These original 10 laws appear to be those recorded by Walter Brodie in 1850.

82. In affording women the vote, Pitcairn may have been the first country in the world to provide for universal suffrage:

> An elder or magistrate is to be elected by the free votes of every native born on the island, male or female, who shall have attained the age of eighteen years; or, of persons who have resided five years upon the island.

83. The Regulations also stipulated the form of oath the Magistrate was to take:

> I solemnly swear that I will execute the duties of Magistrate and Chief Ruler of Pitcairn's Island, to which I am this day called on the Election of the Inhabitants, by dispensing justice, and settling any differences that may arise, zealously, fearlessly & impartially, and that I will keep a Register of my proceedings, and hold myself accountable for the due exercise of my Office, to Her Majesty the Queen of Great Britain or her representatives;- so help me God.

84. The HMS *Fly*'s visit to Pitcairn had been in furtherance of instructions given by the Admiralty to

Rear-Admiral Ross, Commander-in-Chief of the Navy in the Pacific, in 1838 to send a ship to the Society, Friendly and Pitcairn Islands at least once a year.

85. In forwarding on Eliott's report to the Admiralty, Ross wrote:

> I feel it my duty to express to their Lordships, my entire approbation of the judicious and masterly way Captain Eliott has carried those orders into execution; …

86. Across the bottom left-hand corner of the second page of Ross' letter, the notation appears:

> 30 Sept.
> Their Lordships are pleased with the very satisfactory manner in which Capt. Elliot [sic] has conducted this service.

87. An extract from Captain Eliott's report was forwarded on to the Colonial Office, where the Permanent Under-Secretary of State James Stephen commented:

> I confess I know not how anything can be done for the inhabitants of Pitcairns Island. It is impossible to establish an independent Govt. or Colony there, nor do I know how the Island could with any propriety be annexed to the Govt. of New South Wales, which has no sort of connection with it. Yet if neither of these measures be practicable, we are I believe at the end of all our resources.

88. There does not appear to have followed any formal pronouncement of the status of Pitcairn. The advice of the Law Officers on the trial of Harry Christian described the events surrounding the arrival of the HMS *Fly*:

> That in 1838 Captain Elliott R.N. visited the Island in her Majesty's ship "Fly" and, on the representation of the leading inhabitants – who had been much harassed by American whalers – drew up certain regulations for the election of a Chief Magistrate and supplied the Islanders with a Union Jack, which was hoisted under his authority, in token of their submission to Her Majesty's sovereignty.

89. It was said by Mr McLoughlin, a former Legal Adviser to Pitcairn *Laws of Pitcairn, Henderson, Ducie and Oeno Islands*, Revised Edition 1971, p21 **(Tab)**:

> By that brief document the people of Pitcairn Island, with the ready assistance of Captain Elliott [sic], formally acknowledged their status as a British possession and, as a natural consequence, placed themselves under the protection of the British Crown.

THE STATUS OF PITCAIRN AFTER THE ARRIVAL OF HMS *FLY*

90. The Supreme Court and the Court of Appeal identified 1838 as being the year when Pitcairn was probably acquired as a British possession. This was said to have occurred upon the arrival of HMS *Fly*.

91. The Court of Appeal observed:

> It was not suggested that an unauthorised settlement by British subjects could prevent the territory concerned from later becoming a British possession. The available material establishes acquisition as a British possession, probably as far back as 1838. The provision and acceptance then of the Union Jack and the establishment of a Chief Magistrate required to take an oath of loyalty and to be accountable to the Queen, are significant factors. Traditionally, this date has long been regarded as the time when Pitcairn Island had its definitive origin as a British possession.

92. The Appellants submit that Pitcairn did not become a settlement within the meaning of the British Settlement Act because, as has earlier been submitted, it was acquired by cession.

93. By 1838 the leading inhabitants of Pitcairn were happy to seemingly submit to the Sovereign, and appear from that point on to have regarded themselves as British subjects.

94. It is submitted that where there is an issue as to whether a territory was ceded or settled, that issue is to be determined as at the time the territory becomes subject to the Queen's dominion. *Sammut v Strickland*. *R (Bancoult) v Secretary of State of Foreign and Commonwealth Affairs* at 1102.

95. Halsbury's:

> … the classification is one of law, and once made by practice or judicial decision will not be disturbed by historical research. The basis of distinction is the stage of civilisation considered to have existed in the territory at the time of acquisition: if there was no population or no form of government considered civilised and recognised in international law, possession was obtained by settlement; where there was an organised society to which international personality was attributable, acquisition rested on cession or conquest.

96. The Court of Appeal went on to say touching on the issue of cession:

> As we have discussed, we agree with the Supreme Court that, on the facts, Pitcairn was a British possession acquired by settlement. There was at the time of acquisition no organised society to which international personality could have been attributed. Pitcairn was

> hardly in the same situation as Malta, which was peacefully ceded to the British Crown in circumstances described in the Privy Council judgment of *Sammut v Strickland* [1938] AC 678.

97. The Court added:

> For the above reasons, which essentially are the same as those expressed in the Supreme Court, on the whole of the material made available and drawn to our attention, we find it impossible to conclude other than Pitcairn Island was a British settlement within the meaning of the 1887 Act when the Orders in Council of 1952 and 1970 were made. To contend that Pitcairn Island is independent, that it is not a British possession, and that the United Kingdom does not have sovereignty over it, is palpably unreal. Sovereignty was acquired by settlement or occupation and that sovereignty pertains today.

98. It is submitted that the Court of Appeal took an overly narrow view of what cession meant in the light of *Sammut v Strickland*. That case decided some 40 years after the Advisory Opinion on Harry Christian in 1897 asserted that there did not have to be a formal cession by a sovereign power, and that there could be cession by a native tribe or a voluntary cession of authority of a less formal kind than an organised society to which international personality could have been attributed. In *Sammut v Strickland* at pp699 **(Tab)**, it was said by Lord Maugham:

> What, then, was the true nature of the title of the Crown to the sovereignty of Malta? In answering this question it is important to bear in mind that we are considering a matter of substance rather than one of names or labels. The contention of the respondent on this part of the Case is founded on the proposition that the prerogative of the Crown to legislate by Orders in Council and Letters Patent for the Government of a possession (using the word in the widest sense) is restricted to cases where the possession was acquired either by conquest or by cession, but the word “cession” is employed by the Respondent in this connection in a limited sense so as to exclude a voluntary

> cession by the general consent of the people. This involves the division of ceded territories into two classes, those acquired by an act of cession from some sovereign power and those ceded by the general consent or desire of the inhabitants. Their Lordships must observe that there seems to be no authority in any case or recognised text - book on constitutional law for this distinction.

99. Indeed, it is submitted that the Law Officers Opinion relating to Harry Christian cited above, accurately encapsulates a view of the relationship between Pitcairners to the British Sovereign in 1838 that reflects the wider concept of cession that the Privy Council later approved, in *Sammut v Strickland* at p700 **(Tab)**:

> If the contention as to the limited meaning of the word "cession" is correct, it would seem to follow that British possession acquired by voluntary cession being therefore "British Settlements" are in several respects in a less advantageous position as between themselves and the Crown than possessions acquired by formal cession by some independent sovereign with or without the consent of the people. It seems clear to their Lordships that in both these Acts the Legislature is using the word "cession" as including cases of voluntary cession …
>
> In Halsbury's Laws of England, 2nd ed., vol 1 xi., tit Dominions, Colonies, Possessions, etc., p.ii, will be found a list of 18 possessions of the Crown acquired by cession, including cases of cession by tribal chiefs.

100. It is submitted that the actions of Pitcairners more appositely reflects the concept of voluntary cession than the actions of the inhabitants of Malta whom seem more to have acquiesced or approbated the actions of the British in proclaiming Malta to be subject to the British Crown. In the case of *Sammut v Strickland*, there seems to have been no initiation of cession by the Maltese. What occurred was in response to British action, where as here, the

request for British assistance and protection was initiated by the inhabitants of Pitcairn. It seems the population was reasonably sizable as Captain Eliott mentioned about 99 people. Pitcairn had existed as a community for 48 years.

101. It is submitted it was a case of voluntary cession, and not dissimilar in motivation to the people of Malta who sought the protection of the Crown also. The Privy Council noted at page 698 **(Tab)**:

> It must be born in mind that the population of the Island was only that of a moderate town in England, that its size is about that of the Isle of Wight, and that its people, however brave, could not have hoped to resist without assistance the attack of a first- rate power.

102. In this regard, it is submitted that the contention of the Court of Appeal that Pitcairn did not fall within *Sammut v Strickland* because unlike Malta, Pitcairn lacked international personality was to adopt an overly narrow approach. On this point, the Privy Council said at p701 **(Tab)**:

> It seems to their Lordships to be reasonably plain that the principle which excluded cases of settlement from the Royal Prerogative has no application to cases where there has been a cession in the popular sense, whether with or without the assent of the inhabitants, and that there is no valid ground for the distinction suggested between the case of Malta and other cases of cession.

103. The Appellants submit that any steps taken by British authorities to govern Pitcairn on the basis that it was a British settlement under the British Settlements Act was *ultra vires*. This includes the inclusion of Pitcairn under the umbrella of the Pacific Order in Council 1893, in 1898 by instrument signed by Secretary of

State Chamberlain, and the subsequent acceptance of powers to govern Pitcairn by authority of a Governor under the Pitcairn Orders 1952 and 1970.

THE PREROGATIVE

104. The Crown has plenary prerogative legislative powers with respect to a ceded colony, subject to the rule in *Campbell v Hall*, 1 Cowp. 204 **(Tab)**. That rule is that if the Crown grants a representative legislature to the colony, it cannot derogate from that grant and thus loses that prerogative power unless (as is usually the case), it has expressly reserved the power when granting the constitution. If the prerogative power has been lost, but representative institutions are later revoked by statutory authority, the prerogative revives.

105. Reference is made to para 16 of *Halsbury*, 2nd Ed, 1933, Vol 11, **(Tab)**:

> As regards colonies conquered or ceded, the King possesses absolute power to establish such executive, legislative, and judicial arrangements as he thinks fit, subject only to the condition that they do not contravene any Act of parliament extending to all British possessions or to that possession. But this right is lost by the grant of a representative legislature unless it is expressly retained in whole or in part. If not so retained, power to legislate as to the constitution or generally can only be recovered under this authority of an Act of parliament. Power to legislate generally is regularly retained in instruments now passed.

106. The definition of "Representative Legislation" in the Colonial Laws Validity Act 1865 is one in which at

least half the members of one house are elected by the inhabitants of the colony.

107. If the correct position is that there was a voluntary cession of authority by Pitcairn in 1838 to the British Sovereign then, it would follow that the Sovereign had prerogative power to govern Pitcairn, after 1838. It is to be noted that in the Pitcairn Orders of 1952, and 1970, there is a residual provision, expressed as “or otherwise in Her Majesty vested”. If by this phrase it is meant that it was intended to preserve a claim to have prerogative power to govern Pitcairn, this is at odds with the various assertions the Crown has made since 1898 that Pitcairn was a British settlement under the Act. It is noted also that the Pitcairn Order in Council 1952 is headed "British Settlements" and the preamble relies on the British Settlements Acts 1887 and 1945 **(Tab)**.

108. If the Crown had prerogative power to govern Pitcairn by virtue of its voluntary cession in 1838, it has not purported to exercise that power, opting instead to consistently since 1898 govern under the British Settlements Act.

109. Further, the Crown has, it is submitted, by its agents, Captain Eliott of HMS *Fly* in 1838, Captain Rookes of the Champion in 1892, and by officers acting under the authority of the Western Pacific Commission such as Mr Simons in 1904, and Deputy Commissioner Maude in 1940 recommended systems of representative governance in domestic

matters for Pitcairn which were adopted by Pitcairners.

110. It is submitted accordingly that the Crown could not by way of prerogative have imposed a new system of legislature by office of Governor for Pitcairn under the Pitcairn Orders in the face of the representative legislature that existed on the Island. *Campbell v Hall* **(Tab)**, de Smith *Constitutional and Administration Law*, 2nd ed, Penguin 1973 at p647 and fns 51-53 **(Tab)**

111. The only way to superimpose a legislature upon Pitcairn by way of Governor was by Act of Westminster Parliament, analogist to the way it is submitted that Jersey has been governed. See de Smith and Brazier, *Constitutional and Administration Law*, 6th ed, Penguin at p59-60 and further fn 63 in relation to the constitution of the Court of Appeal **(Tab)**. The Court of Appeal of Jersey was established in reliance on the prerogative in 1944 but never came into operation. Appeal Courts were finally set up in 1961 after legislation had been passed in the usual way. See de Smith and Brazier above at fn 63.

CONSTITUTIONAL CONVENTION TO CONSULT

112. BY analogy with Jersey also, it is submitted that constitutional convention requires, in respect of legislative instruments purporting to impose taxation or to regulate matters of purely domestic concern, that first consultation with the insular legislative body

should take place with the purpose of reaching an accommodation: see de Smith and Brazier, 6th ed, at p60 **(Tab)**.

113. Matters regarding the prosecution of offences and the organization and structure of Pitcairn Courts, the machinery of justice and venue required to prosecute indictable crime fall squarely within the category of domestic affairs.

114. There is no record of any form of consultation having taken place between the Governor and the insular Pitcairn legislative body over such serious domestic issues. It is submitted that these should have taken place in a timely manner after it was decided to place Pitcairn beyond the province of the Western Pacific Commission. Instead, there has been a flurry of legislative activity between the Foreign Office and the Governor in order to at least in substantial part accommodate these prosecutions.

115. It is submitted that the British Government was in breach of this constitutional convention and that such legislative arrangements and actions that have taken place in recent times to establish "a workable legal system" are invalid.

116. It is submitted that governance of Pitcairn today must be regularised by act of Westminster Parliament.

PART IV - THE PROMULGATION, LATE CONSITUTION OF THE MACHINERY OF JUSTICE AND RELATED ISSUES

GROUND II - WHETHER THE SEXUAL OFFENCES ACT 1956 WAS INCORPORATED INTO PITCAIRN LAW?

Introduction

117. The relevant Judicature Ordinances provided for the importation of English law into Pitcairn in various ways.

118. The Judicature Ordinance, 1961, ss7 and 8 provided that:

> S. 7 Subject to the provisions of section 8 of this Ordinance the substance of the law for the time being in force in and for England shall be in force in the Islands.
>
> S. 8 All the laws of England extended to the Islands by this Ordinance shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties, and otherwise as may be necessary to render the same applicable to the circumstances.

This Ordinance came into force on the 8th of October 1961.

119. The later Ordinance, the Judicature Ordinance 1970 provides:

> S 14 (1) Subject to the provisions of the next succeeding subsection the common law, the rules of equity and the

> statutes of general application as in force in and for England at the commencement of this Ordinance shall be in force in the Islands.
>
> S 14 (2) All the laws of England extended to the Islands by the last proceeding subsection shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties, and otherwise, as may be necessary to render the same applicable to the circumstances.

This Ordinance came into force on 27 of October 1970.

120. The Judicature (Amendment) Ordinance 1983 provided that the law then in force in England as at 1 January 1983 applied to Pitcairn, an advance in time from the law as it was on 27 October 1970.

121. The Pitcairn Order 1970, s5(3) provided:

> All laws made by the Governor in exercise of the powers conferred by this Order shall be published in the manner and at such place or places in the Islands as the Governor may direct.

122. It was further provided in s5(4) that:

> Every such law shall come into operation on the date on which it is published in accordance with the provisions of subsection (3) of this section, unless it is provided, either in such law or in some other enactment, that it shall come into operation on some other date, in which case it will come into operation on that date.

123. Before the Supreme Court, the Public Prosecutor presented evidence, which established that there

had been promulgation of the relevant Ordinances, and this is accepted under both the Pitcairn Orders 1952 and 1970. The Supreme Court found however there had been no publication of the Sexual Offences Act 1956 on the Island.

An inadequate phrase to communicate the fact of the incorporation of English Penal Law to Pitcairners

124. It is submitted that the phrases "substance of law" and "statutes of general application" did not communicate to Pitcairners that English penal law applied, whatever may be the merit of the phrases as instruments of incorporation of English law otherwise. It is submitted at the very least Pitcairners should have been directed to the fact that English criminal law applied to them. The Pacific Order in Council 1893 **(Tab)** for example, had made express provision for its application. There, it was provided:

> 20. Subject to the provisions of this order, the civil and criminal jurisdiction exercisable under this order shall, so far as circumstances admit, be exercised upon the principles of and in conformity with the substance of the law for the time being in force and for England, and with the powers vested in and according to the course of procedure and practice observed by and before the Courts of Justice and Justices of the Peace of England, according to their respective jurisdictions and authorities.
>
> 21. Except as to crimes or offences made or declared such by this order, or by any regulation or rule made under it-
> Any act other than an act that would by a Court of Justice having criminal jurisdiction in England be deemed a crime or offence, making the person doing such act liable to punishment in England, shall not, in the exercise of criminal jurisdiction

> under this order, be deemed a crime or offence, making the person doing such act liable to punishment.
>
> 23. Crimes, offences, wrongs and breaches of contract against or affecting the person, property, or rights of natives or foreigners committed by persons subject to this Order are, subject to the provisions of this Order, punishable or otherwise cognisable, in the same manner as if they were committed against or affected the person, property, or rights of British subjects.

Uncertainty in the Phrases of Importation

125. It is submitted the phrases "the substance of the law for the time being in force" and "statutes of general application" are inadequate phrases by which to import English penal law.

126. Roberts–Wray, "Commonwealth and Colonial law", Stevens and Sons, London 1966 asserts of the phrase statutes of general application, at p545 **(Tab)**:

> If that phrase were offered as a novelty to a legislative draftsman today, he would disclaim responsibility for its consequences unless it were defined. But it has been in use for many decades, it has been the subject of judicial interpretation, it does not appear to have given the Courts serious trouble, and it has much the same effect as the common law rule. So a change of formula might do more harm than good.

127. Of colonial practice he comments at p548:

> There have also been a few - surprisingly few - legislative interventions to reduce the uncertainty as to which English statutes apply and which do not.

128. He then lists various examples, and concludes after discussion of Nigeria:

> The expression “statutes of general application" has consequently ceased to be a burden on the law of Western Nigeria. The phrase remains elsewhere, but fortunately its native obscurity has been enlightened.

He gives no examples, of enlightenment.

129. Roberts-Wray provides some cases on the importation of English criminal law to colonies at p551:

(a) *Rum Coonloov Chandar Canto Mookerjie* (1876) 2 App Cas 186 **(Tab)**. There, specific English laws relating to champerty and maintenance directed against abuses prevalent in early times in England some of which had fallen into comparative desuetude were not imported into Indian law upon the general introduction of English laws.

(b) *Ruddick v Weathered* (1889) 7 NZLR 491 **(Tab)**. English statutes constituting an affirmance of the common law in relating to gaming offence in force in New Zealand.

(c) *R v Baun* (1901) 3 WALR 1 **(Tab)**. Imperial statutes applying to lotteries of a general nature is a public nuisance and punishable and was in force in West Australia.

(b) *Quan Yick v Hinds* (1905) 2 CLR 345 **(Tab)**. The issue of whether unauthorised lottery Imperial legislation could be imported into New South Wales and considerations of the absence of appeal provisions. Importation was rejected by the High Court of Australia.

130. It is to be noted that the most recent case cited by Roberts-Wray on criminal law was at the turn of last century. None of these cases involved offences of the seriousness with which this Court is concerned.

131. The Appellants submit also, contrary to the view of the Court of Appeal, that until there was a judicial declaration or pronouncement on Pitcairn of the fact that a statute formed part of the substance of English law applicable to Pitcairn or was of general application and applicable to Pitcairn there was no sure foundation for Islanders to intelligibly know in advance that the Sexual Offences Act 1956 was incorporated into Pitcairn law. A pronouncement could not it is submitted have retrospective effect.

132. Aside from judicial declaration, the other means of recording with certainty which English statutes applied to Pitcairn was for the legislature to proscribe them expressly. Roberts-Wray at p548 **(Tab)**, gives examples of territories, that had adopted this approach.

133. The Court of Appeal dismissed this argument on the ground:

> … that such an approach would really be tantamount to denying the provision any efficacy and requiring the specific adoption of each and every law it is intended should apply before it could be applied. That would seem to be contrary to the plain words of subsection (1).

134. Professor Tony Angelo and Fran Wright, *Pitcairn: sunset on the Empire?* (2004) NZLJ 431 **(Tab)** opined that until there was a declaration that a relevant English Act applied, an English penal statute could not have effect on Pitcairn. In their study of the usage of the phrase "statutes of general application" in a sample of 35 cases taken from New Zealand and Pacific countries assert that the usage did not reveal any cases relating to the application of criminal law. They state:

> The finding of applicability of such a statute can surely only be prospective - which probably is to say that an English penal statute could not apply in Pitcairn without being legislated to apply.

135. Jennifer Care in *Colonial Legacies A Study of Received and Adopted Legislation Applying in the University of the South Pacific Region*, (1997) 21 Journal of Pacific Studies, 33 **(Tab)** records an unreported judgment of Donne CJ *In re the Constitution of Tuvalu and the Laws of Tuvalu Act 1987* (unreported, High Court, Tuvalu No. 4/1989) to the effect that:

> …unless an imperial law has been either expressly adopted by the Parliament of Tuvalu or the Court has applied as such by declaring it, it does not have effect as part of the law of Tuvalu ...

(It has not been possible to obtain a copy of this judgment).

The Absence of an Appeal Right

136. It is submitted that the incorporation of English criminal law failed under both the 1961 Judicature Ordinance and the 1971 Judicature Ordinance because there was no provision for a general appeal from a conviction of the Supreme Court included in either Ordinance. Thus, it is submitted that local circumstances pertaining to Pitcairn did not allow for the prosecution of English indictable crime on the Island at the relevant dates namely the introduction of the Judicature Ordinances 1961 and 1970 on the 8th of October 1961 and the 27th of October 1970 respectively.

137. The date for assessing the issue of incorporation of English law was the date at which the Ordinances came into effect. General appeal provisions were first introduced for Pitcairn by the Pitcairn Court of Appeal Order in Council 2000, on the 15th of June 2000 **(Tab)**. By comparison, there was a general right of appeal given in criminal cases as the Court of Appeal observed from convictions under prosecutions governed by the Western Pacific Order, under the Pacific (Amendment) Order in Council 1955 **(Tab)**. The right of appeal was given under Replacement Article 88 of Pacific Order in Council 1893 (1955, No 551) from the jurisdiction of a Judicial Commissioner in any civil or criminal cause or matter to the Fiji Court of Appeal in accordance with the rules, which may be made by the High Commissioner under the provisions of the Order.

138. There was a general right of appeal given from an indictable conviction to the English Court of Appeal under the Criminal Appeal Act 1907 **(Tab)** and under the provisions of the Criminal Appeal Act 1968 **(Tab)**. The omission of a general appeal provision under both Judicature Ordinances for Pitcairn 1961 and 1970, meant that an Islander as at the date of the enactment of the relevant Ordinances was in a worse position, if convicted, than a person convicted of an indictable criminal offence in England because he or she would not have any general right of appeal.

139. This is a similar argument as one that was raised for the successful Appellant in *Quan Yick v Hinds* at 348 **(Tab)**, albeit that the machinery for an appeal to the Court of Quarter Sessions in that case was included within the English statute. There, the High Court of Australia upheld an appeal that English lotteries legislation could not apply because *inter alia* there was no Court of Quarter Sessions in New South Wales to consider appeals at the relevant time when the issue of whether the application of the English legislation fell to be considered: albeit, that prior to the offence occurring, Courts of Quarter Sessions had been constituted in New South Wales.

140. On this point, the judgment of Sir Samuel Griffiths CJ at pp364-5 is of relevance. See also the judgments of Barton J at pp373-374; O'Connor J at p382.

141. The Court of Appeal however distinguished *Yick* on the ground that the legislation in that case incorporated internally an appeal right from conviction for lotteries offences to Quarter Sessions. The Lotteries Act contained a provision that upon conviction a defendant was to be released pending an appeal to Quarter Sessions. It is submitted however, that there is justification for the same approach where the consequences of conviction heavy penalties of imprisonment, albeit that the appeal right is provided independently under separate legislation. Those responsible for the introduction of the Ordinances of 1961 and 1970 should have included a provision for a general appeal as there was had been under the Pacific (Amendment) Order in Council 1955. This is an illustration of one aspect of the Appellant's complaint of late constitution of the machinery of justice: that is a failure to give careful consideration for the machinery for the administration of criminal justice on Pitcairn when responsibility for it was taken from the Western Pacific Commission.

142. The Ordinances expressly provide that the importation of English law is subject to the local circumstances and the limits of local jurisdiction, and it is submitted that the failure to provide a general appeal meant that English penal provisions could not be enforced on Pitcairn.

143. In *Quan Yick v Hinds* at 365 **(Tab)**, Griffiths CJ observed that the relevant time for considering the issue of application of the law to New South Wales

was the date, if they came into existence at all, of the law's existence. His Honour said:

> In the interval before the passing of this Act, which was in fact short but might have been of indefinite duration, offenders convicted under secs 21 and 4 of the Act of 5 Geo IV would have been deprived of any right of appeal. That is, in my judgment, of itself sufficient to show that the provisions of sec 21 applying the penal provisions of the Act to offences created under other Statutes were not suitable to the circumstances of the Colony.

144. Nor, it is submitted does the fact that the Pitcairn Appeals Order 2000 was passed on 15 May 2000 affect matters. That would arrest human rights objections as to any deficiency in the machinery of justice at the time of trial. The relevant date for the consideration of whether the English Act was incorporated into Pitcairn law were the dates on which the respective Ordinances came into force.

145. The Court of Appeal considered that the Governor could legislate for a system of criminal justice that was less advantageous for Islanders than the position of people in England, and this was an answer to the argument that Pitcairners would be placed in an inferior position. The omission to provide for an appeal right was it is submitted a very serious apparent oversight, especially since one had been provided in 1955 from a Judicial Commissioner to the Fiji Court of Appeal. It is submitted that the provision of a general appeal to the Fiji Court of Appeal was a clear indication of the value placed upon a general right of appeal by colonial administrators by that date. It is submitted the issue of the importation of the Sexual Offences Act 1956 fell in any case to be

judged under the Ordinances which expressly provided that the application of English law was subject to local circumstances and the limits of local jurisdiction. This is not to undermine the wide powers of the Governor under the peace, order and good government powers, it is to judge the matter by resort to the relevant provisions of the Ordinances, and the circumstances that existed on Pitcairn at the date of their commencement.

146. Nor, it is submitted is the fact that, (as the Public Prosecutor submitted and the Court of Appeal accepted), the existence of an appeal under the prerogative to Her Majesty in Council a sufficient appeal provision to dispense with the need for the inclusion of a general right of appeal. As this Board has repeatedly advised the circumstances in which it will grant special leave are for good reason very limited. The approach of the Board was emphasised in *R (for the Colony of New South Wales) v Bertrand* (1867) 1 LR 520 at 529-530 **(Tab)** where it was said that intervention either on behalf of the Crown or by individuals will be "very rare". The Board also observed at p530 that applications for appeal labour under "a great preliminary difficulty - a difficulty not always overcome by the mere suggestion of hardship in the circumstances of the case". The Board added "yet the difficulty is not invincible".

147. It is submitted that there would not have been any need to have amended the Pacific Order in Council 1955 had it not been considered that in the modern age a general right of appeal was required as an

essential aspect of the machinery of justice. The significance of a general right of appeal has been recognised by the provision of such a general appeal under the Pitcairn Appeals Order 2000.

148. Finally, it is submitted that the Court of Appeal were wrong to defend the importation of the Sexual Offences Act 1956 into Pitcairn law for the additional reason, that because there had been no appeal until the year 2000, the Appellant's argument if correct meant that:

> If the lack of a right of appeal prevented English laws from being imported into Pitcairn, it would mean that at least during the time that statutory provision had been made in respect of rape in England, there had been no similar offence in Pitcairn. The same would apply to the offences of indecent assault and incest.

149. The failure to have included appeal machinery in the Ordinance must mean it is submitted that the Sexual Offences Act, 1956 was not enforceable on Pitcairn, at the relevant time of offending.

GROUND III - ABUSE OF PROCESS

150. The Courts have the power to restrain executive action and stay prosecutions for an abuse of process. There have been many situations where abuse of process has been argued and the courts have said that general guidance as to how the discretion should be exercised in particular cases will not be useful. In *R v Latif* (1996) 1 WLR 105 **(Tab)**, Lord Steyn observed at p112:

> In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: …

151. It is submitted that failure or neglect to provide Pitcairn with intelligible publication of the Sexual Offences Act 1956, accompanied by other deficiencies in governance such as the lack of provision of any warning that the criminal law would be enforced in modern times by the presence of British police officers on the Island, and the absence of any machinery of justice for the trial of indictable offences, constitute one of those other non-defined instances where to use the words of Lord Bingham in *Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72 at p90, para 25 **(Tab)**, "they will be recognised when they appear". It is submitted that it was unfair to try the Appellants at all for crimes under the Sexual Offences Act 1956 until the deficiencies were rectified.

152. The Appellants submit that the deficiencies in the system of criminal justice and the administration of English penal law on the Island were well known to the Governor and that it constituted an abuse of process to commence these prosecutions in those circumstances. The Appellants in particular refer to correspondence between the Governor of the day, Governor Williams, his Deputy, Mrs Wolstenholme, and the Foreign Office concerning the serious state

of neglect of the legal system on Pitcairn Island. These documents and others are itemised in the next paragraph.

153. Reference is made to the following documentary evidence, which is referred to in the judgment of the Supreme Court:

> [98] In particular, the Public Defender relied on the following documents:
>
> [a] In 1996, Leon Salt, Pitcairn Commissioner, had suggested to the Governor that a case could be made to the Overseas Development Agency (ODA) for support to conduct a complete revision of Pitcairn's judicial system.
>
> [b] Governor Williams commented on the inadequacy of the current Pitcairn legal system to deal with cases involving sex and underage girls in a letter to Mr C J B White of the ODA dated 16 December 1999.
>
> [c] Mrs K S Wolstenholme, the Deputy Governor, in a letter dated 6 January 2000 to Commissioner Salt, informed him that the Governor was very concerned to have a workable legal system in place as soon as possible and that the age of consent question be settled.
>
> [d] Mrs Wolstenholme's letter (as Acting Governor) to Mr Stephen Evans of the Foreign and Commonwealth Office (FCO) dated 1 May 2000, acknowledges that the situation was partly of the Administration's making and that it was "not altogether surprising if the community does not see the laws as applicable to them."
>
> [e] Governor Williams, in a letter to Mr Evans dated 24 October 2000, expressed concern that if the prosecutions were to fail because the law was so obscure it could not reasonably be enforced, or the widespread nature of the offences, and the total absence over many years of any attempt by Her Majesty's Government to apply the law, meant that it could not reasonably be applied now without further warning.

[f] A memorandum dated 30 October 2000 Mr C J B White to Baroness Scotland, copied to others, noted that the National Institute for Social Work commented that with hindsight the structure of governance on Pitcairn had failed the community.

[g] Reference was also made to a letter from Commissioner Leon Salt to Constable Cox to proceed cautiously with an inquiry into complainant A because the legal system was not in place to deal with such matters.

154. Other documents of relevance are:

(a) The report of Eva Learner, (NISW) Associate entitled "Summary Report on Pitcairn Island" dated 20th September 2000 together with Memorandum dated 2nd October 2000 from Mr Mike Evans to Stephen Paul Evans **(Tab)**.

(b) Proposed report on Pitcairn to be sent by Governor Williams to the Public Prosecutor for Pitcairn briefing him on public policy matters dated 20th October 2000 and Governor Williams' further response to Mr White of the Foreign Office dated 27th October 2000.

155. The Appellants' submissions on the issue of publication and issues that relate to the fairness of prosecuting Islanders in the face of the perceived deficiencies were summarised by the Supreme Court as:

> The Public Defender submits that apart from an oblique reference to the English general statutes applying to Pitcairn in the Judicature Ordinances, the substance of English criminal offences and penalties were not set out

so as to inform Pitcairn Islanders clearly in advance of prosecution of the seriousness of offending under English law. Documents relied on by the Public Defender reveal a process of consultation with the Governor, generally after an incident had occurred, in an *ad hoc* and occasional way. The fact that advice was sought from time to time could have heralded to the Administrators that there was a need to confront this issue directly and provide Pitcairn with a clear and meaningful summary of the relevant laws and penalties under English law. Had the Pitcairn Islanders been properly advised of the consequences of serious offending and – young men in particular – educated on the threat to their liberty if they engaged in serious criminal misconduct, these crimes may never have happened.

THE FAILURE TO PUBLISH THE SEXUAL OFFENCES ACT 1956 ON PITCAIRN

Publication of Penal law and Good Governance

156. As the Supreme Court found after the disclosure procedure had been completed for the purpose of the "generic argument", there was no evidence of the Sexual Offences Act 1956 ever being published on Pitcairn or legal texts, or *Halsbury's* Laws made available in any way to Pitcairners prior to 1997. The first time English criminal law was available in any published form on Pitcairn was after Constable Cox of the Kent Police imported a copy of *Halsbury's* Laws to the Island in 1997. In that sense, it is submitted that those responsible for the governance of Pitcairn failed in their duty to adequately forewarn Pitcairners of their obligations to abide by the provisions of the Sexual Offences Act 1956, what those offences were, and most importantly also the condign penalties they could incur if they chose to break the law. By comparison with published Island law incorporated in the Justice Ordinances where

offending such as indecent behaviour in a public place or carnal knowledge with a child carried maximum sentences of 100 days imprisonment, offences such as rape carried maximum sentences of life imprisonment.

157. Mr Treadwell gave evidence:

(a) He described his role as like the Attorney-General for Pitcairn. He accepted that he was not simply a person who was giving some legal advice to the Governor but had the responsibilities to the community and functions which should be there to benefit the community.

(b) He admitted that during his period as legal adviser he had not visited the Island and although he had been offered the opportunity to go to the Island by Governor O'Leary, the length of that visit had coincided with commitments to his legal practice. He also said that he had requested permission to visit some years ago after 1987 but he was not given permission to visit.

(c) On the topic of Pitcairners' access to the law he said that access to the internet started 3 years ago and that prior to the internet, the access Pitcairners had to English law was free access to the various persons in the administration including himself.

(d) When asked how could a New Zealander advise on English law when there was no copy of the English law on the Island, his answer was "perhaps not very well".

(e) He said that Mr Harraway or Mr Salt, previous Commissioners, asked him about English law if they did not know the answer, "they would have referred it to me and often did".

(f) He did not know, apart from *Halsbury*, which he had sent to the Island of any other source of English law being sent to the Island other than access to the internet.

(g) He said that it was the Commissioner's job to make sure that the law was properly applied on the Island, that legal procedures were followed, that the law was intelligible to those on the Island. When asked if it was not his responsibility, then whose it was, he said he would pick the Commissioner.

(h) When asked did he ever consider that a code or a summary of English crimes should be properly set out and made accessible to Pitcairn Islanders on Pitcairn, he said "yes, it was going to be done in the process of reforming the legal system". He had opened a file in the late 1990s and that particular project was overtaken by many other obligations.

(i) He agreed with the proposition that in a modern society, good administration required that the criminal law be set out clearly and intelligibly. He said that he believed it was and referred to the provisions of the revised laws in 1970, 1985 and later in 2001, which specifically applied to the territory, the provisions of the law in force, the statutes of general application, the doctrines of equity and the common law.

(j) In his view, that was "not at all an uncommon situation in colonial practice".

(k) He said that he had no information to suggest that prior to the arrival of *Halsbury* on the Island there was ever a copy of any English laws on the Island.

(l) In answer to the question whether he had ever turned his mind to whether potential penalties for serious crimes, English crime had ever been made clear and plain to Pitcairners, he said he did not know about that but he expressed the view that he would have thought that they are worldly wise to the extent that they travel, they have access to news of world affairs through various media. They would know that serious crimes of murder and rape would attract a substantial punishment but he added when asked did he ever turn his mind to the fact that the law relating to serious crime should be spelt out on the Island that he

thought it would be fair to say that he had no inkling that it might necessary.

158. It is submitted it was a pre-condition to the legality of the enforcement of the English statute on the Island that it was published on the Island.

159. The attention of the Court is drawn to the provisions of the *Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949* in occupied territories and in particular Article 65 **(Tab)**:

> The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

160. The publication notes state:

> 1. "Publication"
> It may seem surprising that a whole Article of the Convention should be devoted to stating such an obvious principle, but the experience of two World Wars has shown that principle is not always observed. Article 65 was adopted with a view to ensuring its observance in the future.
>
> The Occupying Power must not, for example, rest content with merely broadcasting the information, for the broadcast may only be heard by a portion of the population. The full text of the legislation must be published. The Convention does not prescribe the mode of publication, which may be through the medium of the local press, in an "official Gazette" specially issued for the purpose, or by posting notices in places specially set aside and known to the Public. The Occupying Power will sometimes resort to all three methods simultaneously. The language used will of course be the official language of the country concerned, that is to say the language in which the laws of the State are published.

161. Likewise, it is submitted at least in modern post-war colonial government practice, the importance of the Rule of Law and plain publication of imported penal law should not have been lost on administrators. Mr Treadwell gave evidence that he recognised the value of a code.

The Obligation to Communicate Penal Law

162. It is submitted at the heart of a legal system lies the need to communicate clearly and intelligibly the law that those subject to it are expected to observe. Professor Lon Fuller *The Morality of Law* New Haven and London, Yale University Press, 2nd ed, p209 **(Tab)** writes "of the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order". Publication of the criminal law together with the provision of the machinery to ensure compliance with the law are it is submitted fundamental requirements of a proper functioning legal system, in a civilised modern society. It is submitted in the modern age the criminal law must be promulgated or published with sufficient clarity and precision to inform citizens prospectively of the crimes and penalties for which they are at risk. Likewise, it is submitted, the criminal law of the governor must in the modern world, be clearly communicated to the governed in the sense that the offences and penalties are intelligibly published in that community. Not only should this be a fundamental proposition of justice and the Rule of Law, but also it represents a fundamental rule of good, enlightened and fair

administration of criminal justice, in the context of colonial administration. The more remote the possession or territory that is being governed, the greater must be the steps taken to ensure meaningful publication of the penal law to its inhabitants. Those who are expected to comply with imported penal law should not have to divine that law.

163. It may be inconvenient and appear perhaps unnecessary amongst people commonly believed to be harmonious and law abiding in small communities to take such steps. However, it is submitted that the Rule of Law is all encompassing. It should not in the modern world of communications, and an increased awareness of human rights mean that any distinction should be drawn for the purpose of the administration and application of the criminal law between the governor and the governed. Before there can be prosecution of criminal offences, there must be compliance with the Rule of Law, the most important aspect of which is publication of the penal law in the community of the governed.

164. Professor Fuller wrote at p209-210 **(Tab)**:

> Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing.

165. It is submitted that the omission to promulgate or advertise in an intelligible form the nature of the offences and penalties under the Act deprived the Pitcairn community of both the legal and moral force or authority that the publication of the criminal law means for a community. It is notice to the community at large of the lawful standards of conduct expected of members of the community. It embodies the metes and bounds of the moral values of that society that are enshrined in the law and will be protected by it. It provides the community with definite rules about the standards of conduct to which it must aspire, and by which they must live together. This is born out in the writings of legal theorists from the time of St Thomas Acquinas referred to below. In relation, to this issue of morality, it was promulgation, which Professor Lon Fuller saw as embodying one aspect of the "inner morality of law" that could be treated as indicative of a morality associated with duty or obligation rather than of aspiration. He wrote at p43 **(Tab)**:

> To these observations there is one important exception. This relates to the desideratum of making those laws known, or at least making them available to those affected by them. Here we have a demand that lends itself with unusual readiness to formalization. …. A formalization of the desideratum of publicity has obvious advantages over uncanalized efforts, even when they are intelligently and conscientiously pursued. A formalized standard of promulgation not only tells the lawmaker where to publish his laws; it also lets the subject - or a lawyer representing his interests- know where to go to learn what the law is.

166. The place of the Rule of Law as an educative instrument for the better regulation of society can be

traced back at least to the philosopher St Thomas Acquinas who in his *Summa Theologiae I-II* defined law as "nothing else than an ordinance of reason for the common good, made by him who has care of the community and promulgated" **(Tab)**. Dr Shirley Letwin in her *History of the Idea of Law*, Cambridge University Press, 2005, at p70 **(Tab)** wrote of Acquinas having referred to the above statement that:

> This "ordinance of reason" provides a "directive principle" for human actions because, by being promulgated, law "imprints" on those subject to it a rule that provides for them a "principle of action". Law thus satisfies the natural need of rational mortals for direction by a rational principle.

That is, it provides a standard to which men can aspire to live and by which the general community can productively and harmoniously exist.

167. The concept of the Rule of Law and promulgation as a guiding principle for human behaviour is also seen in the writings of Simester and Sullivan, *Criminal Law, Theory and Doctrine*, 2nd Edition, Oxford-Portland Oregon 2003, (citing Professors Raz and Colvin). They write at p37 **(Tab)**:

> Central to the protection of those rights and expectations is the Rule of Law, which demands that those under the State's control should be dealt with by fixed and knowable law, and not according to the discretion of the State (including judicial) officials. As such, the Rule of Law embodies a cluster of legal values, including certainty, clarity and prospectivity; which have at their heart not merely the constitutional premise that government should operate under the law, but also the ideal that citizens should be able successfully to live within the law, by deriving guidance from the law itself. This in turn requires

that the criminal law must be organised, ascertainable, system of legal rules – and not *ad hoc* responses to the conduct of individuals.

168. As Professor Fuller wrote at p210 **(Tab)**:

> The twin principles of generality and of faithful adherence by government to its own declared rules cannot be viewed as offering mere counsels of expediency. This follows from the basic difference between law and managerial direction; law is not like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.

169. Professor Joseph Raz wrote in his *The Authority of Law*, OUP, 1979, in a chapter entitled the "Rule of Law and its Virtue" at p214 **(Tab)**:

> The law must be open and adequately publicised. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An unambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.

170. Professor Eric Colvin in *Crime Justice & Codification* (edit P Fitzgerald), 1986 Casswell writes in Chapter 9 "Criminal Law and the Rule of Law" at p137 **(Tab)**:

> In the context of criminal law, the term “principle of legality” is often substituted for “ideal of the rule of law”. The term” ideal of the rule of law” will, however, be used here. Both expressions signify that the institutional design for the criminal law should maximise its capacity to shape a voluntary social order. They are therefore linked to the general communicative or educative function of criminal law. Criminal law is viewed as a device for communicating standards of conduct for the guidance of persons from whom voluntary compliance can be anticipated. Criminal

> law has functions other than this. There are, however, good reasons for asserting a measure of primacy for its general communicative or educative function.

171. In the penultimate paragraph to this chapter, he says, perhaps drawing from Fuller's concepts of the morality of aspiration and that of duty at p42-43 **(Tab)** and it is submitted, apposite for Pitcairn:

> The ideal of the Rule of Law speaks to both aspiration and duty in the imposition of criminal liability. At the level of aspiration, it can be taken to present a model of good institutional design which law-makers should seek to attain, even thought the deficiencies do not affect the scope of criminal liability. At the level of duty, it can be taken to present a set of general conditions for the imposition of criminal liability. Conviction and punishment under circumstances, which would violate these conditions should be excluded.

172. Finally, he adds:

> Attachment to the ideal means seeking to advance it in all aspects of the drafting and promulgation of criminal law.

173. The writings of other jurisprudential authors Finnis and Rawls, referring to the arguments of promulgation are mentioned in the judgment of the Supreme Court.

174. It has been submitted that the minimum requirement for Pitcairn was the publication of the Sexual Offences Act 1956 on the Island so Pitcairners had access to it. Good governance would it is submitted in a more practical sense also require that its existence and importance was communicated plainly to Islanders perhaps by public meeting or other means of advertisement, and updated on a regular basis. Publication in a popular sense was also the

aim of the Geneva provisions cited above. Jeremy Bentham in his writings *Of Promulgation of the Laws and Promulgation of the Reasons Thereof* **(Tab)** said:

> Let us suppose the general code completed, and that the seal of the sovereign has been set to it. What remains to be done?
>
> That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated. But to promulgate a law, it is not only necessary that it should be published with the sound of trumpet in the streets; not only that it should be read to the people; not only that it should be printed: all these means may be good, but they may be all employed without accomplishing the essential object. They may possess more of the appearance than the reality of promulgation. To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as they have it habitually in their memories and may possess every facility for consulting it, if they have any doubts respecting what it prescribes.

175. In her report, Evan Learner a NISW Associate, on her visit to Pitcairn in or about the year 2000 **(Tab)**, wrote of the dysfunctional state of the Island in relation to child abuse and observed that Islanders were confused about the age of consent, some being of the opinion it was 12. Others talking of the fact that in years past, the "Rule Book" (that is Island penal law) was read out at public meetings twice at year. Learner reported that she was informed that in those days people knew what the law said. She added that on many levels, there was confusion about the age of consent. This report is educative generally about perceived attitudes towards sexual behaviour and cultural aspects on the Island.

176. It is submitted that whilst publication of the Sexual Offences Act 1956 on the Island was a pre-requisite to prosecution, the point made by Bentham is that good governance would have reinforced the fact of publication by further regular communication with Islanders the importance of abiding by English law.

Accessibility and the Approach of the Supreme Court and Court of Appeal

177. On the issue of accessibility, the Public Prosecutor, as he had in the Supreme Court, accepted before the Court of Appeal there was a need for the law to be accessible. In this regard, reference was made to Lord Evershed who said in *Lim Chin Aik v The Queen* (1963) AC 160 at 171 **(Tab)** of promulgation:

> In their Lordships' opinion, even if the making of the order by the minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede) the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision, corresponding, for example, to that contained in s3(2) of the English Statutory instruments Act of 1946, for the publication of an order of the kind made in the present case or any other provision designed to enable man by appropriate inquiry to find out "what the law is".

178. Further, Lord Philips in the Court of Appeal more recently in *R (on the application of L and another) v Secretary of State for the Home Department* [2003] 1 All ER 1062 observed at 1069 **(Tab)** that:

> It is an aspect of the rule of law that individuals and those advising them, since they will be presumed to know the law, should have access to it in authentic form.

179. Lord Diplock had also emphasised this point in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) at 638 **(Tab)**, where he stated:

> The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.

180. Further Lord Bingham in *R v Rimmington* [2006] 1 Cr App R 17, noted Lord Diplock's statement in *Black-Clawson* and further Lord Diplock's statement in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 279 **(Tab)**:

> Elementary justice, or to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be assertainable by him (or more realistically by a competent lawyer advising him" by reference to identifiable sources that are publicly accessible.

181. The Public Prosecutor however submitted before the Supreme Court and the Court of Appeal that the law was accessible to Islanders. They could have ascertained from the Administration what the law was and thus it was reasonably accessible to them. The Supreme Court observed:

> On the basis of these principles, we conclude that the law demands not that citizens have express awareness of the content of the law, nor that the law is promulgated to that extent, but that the law needs to be accessible in order that people can regulate their conduct by it. Where it is so accessible, people are deemed to know of it.

182. The Supreme Court accepted the Public Prosecutor's submission that publication of English law on Pitcairn was not mandatory so long as the law was otherwise accessible, and in the view of the Supreme Court, Pitcairners had access to it through the administration although there was no evidence of the publication of the Act on the Island. The instances of this are documented below.

183. These were:

(a) Captain Eliott of HMS *Fly* in 1838, was responsible for drawing up a form of constitution and a series of laws, which were adopted by the Islanders. Under them, it was noted that serious crimes were to be referred to the captain of the next visiting warship.

(b) In 1893 Captain Rookes of HMS *Champion* drew up a comprehensive new set of laws and regulations, which were adopted by the Islanders.

(c) Later amendments to the laws by visiting Naval captains, including in 1906 Captain Gaunt:

> It having been pointed out to me that there is no authority for the detention of an accused persons in serious cases which have to be reported to the High Commissioner's Court it is my direction the Chief Magistrate and Assessors is authorised to ensure the necessary confinement.

(d) In 1898, Pitcairn was brought under the umbrella of Pacific Order in Council 1893. Under that umbrella, in 1904 revised laws were laid down by the Deputy High Commissioner for the Western Pacific. Under those provisions, civil and criminal matters of a serious nature, for which punishment was not provided in the local rules and regulations, were to be dealt with by the High Commissioner's Court for the Western Pacific in Pitcairn. The 1904 Regulations specifically referred to the crimes of adultery and rape being dealt with by the High Commissioner's Court:

> The question of Adultery and Rape (Violation by force) cannot be dealt with by the local Court. Such matters must be referred to the High Commissioner's Court for the Western Pacific

(e) In 1940, Instructions in the form of regulations were promulgated under the authority of the High Commissioner. These regulations included provisions that criminal proceedings were to be taken in the name of the King, and that all cases not within the jurisdiction of the Island Court were to be heard and determined in the High Commissioner's Court for the Western Pacific. The 1940 Regulations were issued in the form of "Instructions for the Guidance of the Local Government of Pitcairn Island" and were assented to by a General Assembly of all Pitcairn Islanders over the age

of 17 years on 7 October 1940. Attention was drawn to:

(i) Regulation 15: Jurisdiction of the Local Court.

(ii) Regulation 16: Jurisdiction of the High Commissioner's Court.

(iii) Regulation 21: Review of Judgments by the Court of Appeal.

(f) The 1952 and 1970 Orders in Council then followed, with a large number of Ordinances being enacted under each, including the establishment of a separate Court system. See 1952, 1970 Pitcairn Orders.

(g) An extract from the Pitcairn Island Administration Report circa 1959, recorded a request by the Island Police Officer, Floyd McCoy, for direct assistance from Suva when investigating offences such as rape and abortion:

> FLOYD MCCOY RE CORRESPONDENCE
>
> Although this is a chestnut of some maturity, he has found one more to discuss. He requests if he may address Suva direct where the matter is outside the jurisdiction of the Island Court -- e.g. rape, abortion etc. He was apparently told to investigate such matters by very quiet methods by McCloughlin [sic] and feels that should the Chief Magistrate's family be involved he is in a difficult position.

(h) On 6 January 1965, the Pitcairn Commissioner, Reid Cowell, was in London awaiting departure for Pitcairn. While in London, he was sent drafts of the Justice Ordinance and the Local Government Regulations, and told that 15 copies of each were on their way to the Island Council on Pitcairn to be there before his arrival on the Island. Commissioner Cowell prepared a set of notes "for Island Council discussion 4 March 1965". In particular:

> (a) Limits on local court's jurisdiction:
> From time to time cases may arise over which the Court has no jurisdiction. We have provided, in this section, for jurisdiction to be extended if a need arises. The procedure to follow is to let SPO ["South Pacific Office", Suva] know by radio the broad outlines of the offence when we can advise the Court how to proceed. Do not hesitate for one moment to seek such advice.

(i) Commissioner Cowell travelled to Pitcairn, and met with the Island Council. He reported on his discussions with the Council on 5 March 1965 and commented on the "carnal knowledge" section and its relationship with the law of rape:

> s69 This is an extremely controversial provision and, after much discussion, it was decided to change only the penalty, to 100 days' imprisonment. There was a strong feeling, however, that sexual relations with a girl under 12 years should carry a heavier penalty and the Council wondered whether it, like rape, could be dealt with under s.6 if a need arose.

(j) Following his return to Suva, Cowell wrote to the Island Magistrate on Pitcairn enclosing a revised text of the Ordinance taking into account the Island Council's comments:

> Reference to s 5: "The Court decides whether a case is within its jurisdiction or not. If there is any doubt South Pacific Office can be consulted by radio."
>
> Reference to application of English law:
>
> s 6. From time to time cases may arise over which the Court has no jurisdiction. We have provided in this section for jurisdiction to be extended if a need arises. The procedure to follow is to let South Pacific Office know by radio the outline of the offence when we can advise the Court how to proceed. It should be remembered that in addition to the local law of Pitcairn as enacted in the Ordinance, certain parts of the law of England apply by virtue of s 7 of the Judicature Ordinance No 1 of 1961.
>
> Reference to murder and treason. These are offences under English law -- there is no local law against murder or treason.
>
> Reference to application of English law:
>
> Reference to "Carnal knowledge" offence, and specific reminder that the law of rape applies in Pitcairn:
>
> s.88 We have left the wording of this provision as the Council last March wanted it. Remember, however, that the English law also applies and that if any male person should have carnal knowledge of a female child under the age of 12 years, that male person would be liable to be prosecuted under the English law of rape. In such a circumstance it would be proper for the Court to hold a preliminary inquiry under part vii of the Ordinance.
>
> Serious cases of theft covered by English law:
>
> If the value of the property stolen or received exceeds one hundred pounds s.6 may be invoked or a preliminary inquiry may be held under Part

VII. It would be best to consult South Pacific Office if such a cause were to arise."

After this process, on 10 December 1965, the Magistrate sent a telegram: "Justice Ordinance No. 1 of 1966 approved in full by Council".

(k) S 5(b) of the Justice Ordinance 1966 provided for the jurisdiction of the Island Court:

"5. Subject to the provisions of this or any other Ordinance, the Court shall have jurisdiction-- …
(b) in criminal cases over all offences committed within the Islands or in the territorial waters thereof against the provisions of this or any other Ordinance except in so far as the jurisdiction of the Court is therein expressly excluded:
Provided that--
… (iii) except to the extent provided in Part VII of this Ordinance the Court shall not exercise jurisdiction in respect of any offence arising only by virtue of the provisions of section 7 of the Judicature Ordinance, 1961 …"

Section 7 of the Judicature Ordinance 1961 provided:
"7. Subject to the provisions of section 8 of this Ordinance the substance of the law for the time being in force in and for England shall be in force in the Islands.

Note also:

Section 15 of Justice Ordinance: criminal proceedings taken in the name of Her Majesty the Queen

Section 16: explicit reference to murder and treason

Section 55: committal for trial before Supreme Court

Section 68: power for Legal Adviser to review committal proceedings

(l) Minutes of *Island Council* meeting 9 November 1970:

> PRESENT: All Council Members with Parents and children from age 10 years in attendance. Pastor offered a prayer to open the meeting.
> PURPOSE: To warn the parents and children against the Unlawful Carnal Knowledge - Section 88 of Pitcairn Ordinance of 1966. A complaint was made that raping or the illicit carnal knowledge of a girl aged 11 years without her consent was suspected to have been committed but owing to no definite proof nothing could be done other than a warning given in Council Meeting. Anderson queried the modification of ages from 16 years to 12 years. The I.M. said it was modified when Mr Cowell was here. G.A. and Tom said that if an offence is committed to a girl below the age of 12 years the case will require higher Authorities to deal with the case. Pastor stressed the importance of the parents guarding their young girls from acting free with the boys, especially running around with the boys on various places on the island. After discussing different matters concerning Carnal Knowledge the parents were dismissed and Council Meeting open for Monthly Government Business.

184. The Public Prosecutor also drew the Court to a number of other instances of English law being applied or considered on Pitcairn:

(a) *Harry Christian* trial for murder in 1898.

(b) *Coffin* attempted murder cases 1936. Two cases of possible attempted murder were referred to the Western Pacific High Commissioner in 1936, and the suspects were held in confinement pending word from the High Commissioner. Mr J.S. Neill was appointed as a Judicial Commissioner to deal with the matter, and travelled to Pitcairn (on a

previously-planned trip). He formed the view that no prosecutions were appropriate.

(c) *Edward Christian* domestic violence case 1905. Chief Magistrate hears the case and finds the evidence against Christian "very strong, strong enough to convict [of a breach of Local Law 10]" but refers the case to Deputy Commissioner Simmons for his consideration because of its seriousness and Christian's "past conduct".

(d) *Abortion case* 1940. Charge of abortion against Laura Christian referred to Western Pacific High Commission by Chief Magistrate "seeing that this case is beyond my power to deal with". Having obtained a legal opinion, the Secretary, Western Pacific High Commission, replied by telegram: "I am advised that the alleged confession is of very doubtful admissibility and it is doubtful whether a conviction could be obtained on the remainder of the evidence. No further action should therefore be taken".

(e) *Maurice Christian* recidivist thefts, 1940-41. Reference to Western Pacific High Commission for advice in dealing with Maurice Christian, a kleptomaniac.

(f) *Trespass case* 1947. Civil claim relating to the cutting down of six orange trees referred to Western Pacific High Commission as the

value of the trees is assessed as greater than £10, the limit of the court's jurisdiction.

(g) *Clarence Young* divorce case 1958. Mr McLoughlin travelled to Pitcairn Island and sat as a Judicial Commissioner in the High Commissioner's Court for the Western Pacific to hear the case.

(h) *Donald Young's* intrusion into Tom and Betty Christian's house in 1971. This case of alleged burglary was referred to the administration for advice about possible offences under English law.

185. The Public Prosecutor also referred to the evidence adduced at the trial of the "generic argument". In particular, reference was made to:

(a) *Betty Christian's* affidavit, sworn 27 October 2004, which states at para 5.3: "… it has always been a matter of common sense that serious sexual offending, such as rape, incest, or indecent assault, would be prosecuted under English law". Mrs Christian was born on Pitcairn in 1942, and married Thomas Christian in 1966. She has been Island Secretary since 1997. Evidence was also given at trial by Mrs Christian.

(b) *Thomas Christian's* affidavit, sworn 27 October 2004, states at para 2.2:

> I agree that it is common sense that English law has always applied in Pitcairn, if no local law applies. I remember a provision in the Ordinances that English law applies here if no local law applies, and I would always have expected serious offending, including murder, rape, and serious sexual offending, to have been prosecuted under English law, with the assistance of the Governor's office and the Administration Office.

(c) *Jay Warren's* evidence was called for the defence. He testified in cases of serious crime such as murder or rape he would have sought guidance from the Administration. His affidavit was also filed in evidence.

186. The Court of Appeal summarised the approach of the Supreme Court and noted the Court had reached its conclusion that law was accessible:

> … by referring to a number of instances where Pitcairners had sought the advice of the authorities in all related matters and, in particular, the availability of the Government Adviser for that purpose.

187. The Court of Appeal proceeded to add:

> It is unnecessary to repeat the factual findings, which, although significantly relevant to the issue, are not, in our view determinative of it.

188. It is submitted that recourse to *ad hoc* official advice from time to time when problems arose is not publication of English penal law on Pitcairn sufficient to meet the requirements of the Rule of Law. See Simester & Sullivan referred to above at para 169.

189. The Court of Appeal "in any event" indicated it had some reservations about such reasoning. The Court observed:

> We do, however, have some reservations as to whether accessibility in the way described could as a general proposition be an adequate safeguard and necessarily always answer a challenge to any law which is sought to be enforced. It seems to us that accessibility through a government agency may not always be sufficient to meet the tests described in the decisions.

190. The inquiry according to the Court of Appeal:

> …is whether the appellants can legitimately claim lack of knowledge that they were liable to prosecution under English law for the offences of rape, indecent assault on a woman and incest.

191. In this regard, the Court observed that there could be no doubt that the inhabitants were aware that for serious offending English law applied. The factors that were identified were:

(a) The case of Harry Christian was well known to the inhabitants of Pitcairn.

(b) The 1961 Ordinance and the 1970 Ordinance both expressly referred to the extension of English law to Pitcairn and were promulgated.

(c) Various documentation concerning the introduction of the Justice Ordinance 1966 by Commissioner Reid Cowell, and communications thereto with the Island Council.

(d) As well there was reference to the opinions of Mr and Mrs Thomas Christian that it was a matter of commonsense that serious sexual offending such as rape, incest or indecent assault would be prosecuted under English law.

192. On this issue, it was the view of the Court that:

> Faced with the factual situation it become unreal to contend that it was unfair or unjust to commence these prosecutions because the 1956 Act or a summary of its provisions had not been published locally.

193. It is submitted however, that it is not unreal to require the relevant English indictable crimes and penalties that it is contended applies to Pitcairners in these prosecutions to have been published on Pitcairn. Promulgation today should not be regarded merely as a formal rule that can be dispensed with, if otherwise, it may be thought that the substance of the law is or may be commonly known, or it is contrary to moral standards to perform certain acts. It is submitted in the modern age, the Rule of Law required publication of imported penal law and in particular the Sexual Offences Act 1956 as a minimum pre-requisite to a lawful prosecution.

194. In any event, as was pointed out to the Supreme Court and the Court of Appeal in this case, such advices as were given were imparted years before most of these incidents arose, and Harry Christian the only case of an indictable prosecution on Pitcairn

well over half a century before, the time of the first offence. Even if it is accepted that Pitcairners would know that it was wrong to rape, at least in the sense of violation by force according to Jay Warren (a view that was commonly held amongst English jurists until the 1970s), it is submitted that it is a condition precedent to prosecution under Pitcairn law that clear publication of the relevant English penal statute was required. There should be no burden on a defendant to demonstrate his or her ignorance of the law in circumstances where the law has not been published and the defendant has no access to it.

195. Although as a general principle since the trial of Sir Christopher Blunt and others for high treason arising out of the Essex conspiracy *The Trial of Sir Christopher Blunt and Others*, State Trials, 43 Eliz. 1600, 1410 at 1450 per Popham CJ **(Tab)**, it has been a principle of English law that ignorance of the law is no defence. There is also old and respectable authority that there are limits to this principle.

196. In *R v Bailey* (1800) R & R 1; 168 ER 651 **(Tab)**, twelve Judges, on a case reserved by the trial Judge Lord Eldon, held that the prisoner ought to be admitted to a pardon on an indictment for wilfully and maliciously shooting where he could not have known that English law had extended the crime of malicious wounding to an act arising on the high seas. The prisoner, Bailey, was a captain of a ship the *Langley* that had encountered another vessel the *Admiral Nelson* that was not sailing with colours. There was an argument between Bailey and the captain of the

Admiral Nelson that had been boarded by Bailey, which led to Bailey, later firing on the *Admiral Nelson* and as a consequence a man was seriously injured.

197. It had been argued by Bailey that he could not be found guilty of the offence with which he was charged because the Act had only received the royal assent on 10 May 1799. At the date of the offence, 27 June 1799, Bailey could not know that any such act was unlawful on the high seas because his ship was, at that time, off the African coast. Although Lord Eldon had directed the jury that his ignorance on the act could not otherwise affect the case, he was of the view that it was a factor which might lead to merciful consideration should he be found guilty. The Court of Crown Cases Reserved considered that it was proper to apply for a pardon on the ground that the act having been committed so short a time after it had become an offence, the prisoner could not have known of this. The head note to the English Reports states **(Tab)**:

> On case, the judges thought he could not have been tried if the 39 Geo.III. c 37 had not been passed , and as he could not have known of the Act, they thought it right he should have a pardon.

198. Professor Glanville Williams in his book *Criminal Law*, 2nd ed, 1961 Stevens & Sons Ltd in the "The General Part" at p260 **(Tab)**, considered that this case was authority for the proposition that the plea of ignorance has been rejected even where it was thoroughly established, although ignorance of the law might be taken into account in mitigation of

punishment. It is submitted however that the ratio decidendi of the case is wider than this and that the Court of Crown Cases Reserved considered he should not have been tried at all, and it was for this reason he was admitted to a pardon. In otherwords, it is submitted there are limits to the principle that ignorance of the law is no excuse.

199. Andrew Ashworth in his *Excusable Mistake of Law*, [1974] Crim.L.R. 652, at 654 **(Tab)** wrote:

> A quite separate qualification of the *ignorantia iuris* principle is suggested by the decision of the Privy Council in *Lim Chin Aik v R* (1963). In that case Lord Evershed held that the principle cannot apply if there is "no provision … for the publication" of a certain type of law or regulation, nor "any other provision designed to enable a man by appropriate enquiry to find out what 'the law' is". These remarks merely concern the lack of legislative provision for making laws known or knowable, but it is thought that the practical impossibility of discovering the terms of a particular law might also justify an acception to the principle. The recent industrial dispute which has caused delay in publishing some thirty-four statutes might provide an instance of this extension of *Lim Chin Aik*.

He cited Thomas Hobbes:

> The want of means to know the law, totally excuseth. For the law whereof a man has no means to inform himself is not obligatory.
>
> Hobbes, Leviathan (ed, Oakeshott 1947), 196.

200. It is submitted that the case of *R v Bailey* is important in the context of this case. There has been a finding of fact that the Sexual Offences Act 1956 was never published on Pitcairn, by the Supreme Court. Just as Bailey could not know of the application of the Act extending criminal jurisdiction to the high seas for his

acts, because he was at sea when the Act was assented to and the shooting took place, so here Islanders could not know of the provisions of the Sexual Offences Act, 1956 because there was never any copy of the Act published on Pitcairn. It is submitted that there was no burden on the Appellants to demonstrate ignorance of offences under the Act, where the Act had not been published on Pitcairn.

201. Arguments such as the prosecution raised before the Courts below that crimes such as rape are inherently criminal or *mala in se* and could be prosecuted without publication of the Act on Pitcairn are it is submitted wrong. It is submitted in the modern age Pitcairners were entitled to publication of the Sexual Offences Act 1956 on the Island.

The Court of Appeal and Lon Fuller

202. The Court of Appeal did not dwell on the opinions of the legal theorists to any great extent and appeared to endorse what the Supreme Court had to say in relation to Professor Lon Fuller. The Court observed:

> At the outset, we note the comment of Lon Fuller in his book, The Morality of Law (revised ed, 1969) where at page 92, he said:
>
> … to the extent that the law merely brings to explicit expression conceptions of right and wrong widely shared in the community, the need that enacted law be publicised and clearly stated diminishes in importance.'

203. The Court of Appeal appeared to view this passage, as did the Supreme Court, as Fuller suggesting there

was no need to publish offences that embodied common beliefs that conduct was wrongful. Thus, there was no requirement to publish the Sexual Offences Act 1956 on Pitcairn because Islanders they considered knew that rape and other sexual offences constituted crimes for which they could be prosecuted under English law. The Court of Appeal said:

> Depending on the circumstances whether the person in question knows the law, the issues of accessibility may well lose it force.

204. It is submitted in relation to these observations that it is unlikely that Fuller would have considered as part of his thesis that there was no need to promulgate serious crime. Indeed, the statements above would suggest that Fuller would think otherwise. Any model of the criminal law which values promulgation would be seriously deficient if it did not include such crimes as murder and rape, or theft merely because such conduct could be expected to be viewed as *mala in se* by the general community. Indeed Fuller wrote in his book at p51 **(Tab)**:

> Why all this fuss about publishing them? Without reading the criminal code, the citizen knows he shouldn't murder and steal.

205. Fuller makes the point, albeit in the context of the criminal law and some undefined matter relating to the practice of a calling, that the citizen is entitled to know what the law is. It is submitted that observation must apply generally. In the modern world, a legal system should provide as a matter of entitlement that

all criminal offences and penalties applicable to the citizen should be published.

206. A further reason given by Fuller **(Tab)** is that laws should be published so that they might be subject to public criticism. Another reason is that if laws are not readily available there is no check against a disregard of them by those charged with their application and enforcement. In the context of Pitcairn, that argument has some relevance. Had the Sexual Offences Act 1956 been published on Pitcairn, this may have given aggrieved Islanders the opportunity to make more timely complaint at least to the administration and perhaps steps to involve British police and more robust administration would have been taken earlier.

207. To restrict or limit promulgation in this way would seriously devalue the educative influence it brings to a community, even where the behaviour may be popularly regarded as wrongful. It is argued that the more seriously harmful conduct is, the greater is the need to proscribe that offence and publish the penalty clearly so that the community (both the good and the bad) are plainly warned of the consequences of offending, and an individual has no basis for saying later he or she did not know what the consequences of engaging in such conduct could be.

208. On the issue of *mala in se* the distinction between offences *mala in se* and *mala prohibita* is one that has drawn criticism from Bentham. Bentham said **(Tab)**:

> There are some laws which seem to have a natural notoriety: such as those which concern crimes against individuals; as theft, personal injuries, fraud, murder, &c. But this notoriety does not extend to the punishment, which, however, is the motive upon which the legislature relies for procuring obedience to the law. It does not extend even to those circumstances, often so delicate, which must be noticed before the line of demarcation can be traced among so many crimes differently punished, nor even to those actions which are either innocent or meritorious.

209. The distinction between offences *mala in se* and *mala prohibita* is one today it is submitted which has little support. See Wolfe, *Mala in se: A Disappearing Doctrine?* (1981) 19 Criminology 131 **(Tab)**.

Promulgation of Penalty

210. It is submitted the Rule of Law not only proscribes conduct but also importantly it proscribes the consequences that may follow a failure to abide by the law. This point was made by Bentham in the passage cited above. Although the Rule of Law does not generally refer to consequences, it is submitted that sensibly promulgation requires both offence and penalty should be published. It is the penalty which reflects the importance to the community of the offending. Professor Colvin at p140 **(Tab)** suggests that the Rule of Law includes penalty:

> A rule can present an effective standard for conduct without the penalty for its violation being prescribed. But unless some constraints are placed on sanctioning power, two dangers are heightened. The sanctions imposed for offences may be arbitrary and violate the principle of formal justice; they may also be at odds with the popular

> sense of what is appropriate and created a disjunction between legal and cultural rationality. Either way, the law can appear irrational. Even the possible occurrence of such irrationality can threaten the law's claim to legitimacy. The requirements of the rule of law ideal are therefore relevant to the imposition of penalties as well as to the proscription of conduct. The directions given to those who will decide sentences should meet these requirements. Moreover, the directions and their rationale should be made knowable to the general public.

211. Further, it is submitted, in Professor Colvin's words cited above, it is as a measure of primacy for its general communicative or educative function that penalty is an integral part of an offence. Publication of penalty carries with it a demonstration of the seriousness with which a failure to abide by the official standard will incur punishment. Publication removes all doubt about the official response that might be visited upon an offender. In *Black-Clawson International Ltd*, Lord Diplock at 638 **(Tab)** emphasised that it was the legal consequences that flowed from an Act that the citizen should be able to ascertain.

212. The Court of Appeal however dismissed this point and observed that Islanders would expect to be severely punished for rape:

> It was self-evidence that for rape a substantial term of imprisonment would be available to the sentencer….

213. That might be so it is submitted in a world where prosecution could be expected and where there had been demonstrations of official intolerance and prosecution of rape and other sexual misconduct (as in England) and publicity, but that was not the case

on Pitcairn. There had been no prosecution for an indictable offence since Harry Christian and no indictable prosecution for rape or other sexual offence. At no time had there either been any British police presence on the Island, which stands in contrast with the heightened British police presence since 1997. The reality is that Islanders in modern times had little if any guidance on what could be expected from offending of this kind. Nor did it have the benefit of any demonstration by authority that English penal law would be applied to them for many years. Since 1962 there is has been no recorded prosecution of carnal knowledge of a child under Island Law, and no Island prosecution of any kind since 1971. Criminal law seems not to have been enforced on Pitcairn for a lengthy period. Ricky Quinn was the first prosecution for many years.

Promulgation and Arresting a Drift into Lawlessness

214. Professor Colvin wrote on this topic also **(Tab)**:

> There is a third, crucially important reason for asserting that the "good person" is as much the object of the criminal law's attention as is the "bad person". It is that these persons are not separate entities. The criminological evidence suggests that most people break the law from time to time and that even distinctive patterns of criminal behaviour tend to be episodic and limited in scope. Criminality is more typically a product of drift than of commitment. The formulation and promulgation of the law can influence the direction of the drift.

215. The documented evidence referred to above establishes that in the early 1970's the Pitcairn Council voiced some concern about girls or young

women and young men and promiscuity. However, nothing seems to have been done to educate the community then, and in particular young Pitcairn men, of the very serious consequences that could befall them if they broke English law. Had the opportunity been taken to communicate to Islanders clearly by publication of the Sexual Offences Act 1956 on Pitcairn accompanied by an official meaningful advertisement of its existence and importance, this drift, into a perceived state of promiscuity may have been arrested.

216. Professor Douglas Husack, *Ignorance of law and duties of citizenship* (1994) 14 Legal Studies 105 **(Tab)** has written:

> Deciding how much blame persons deserve for being ignorant of the law without evaluating the quality of the state's effort to inform persons of their obligations is like deciding how much blame persons deserve for being illiterate without evaluating the quality of the state's schools. Good citizens make an effort to learn the law of the state but duties inhere in both directions. Good states make an effort to teach the citizens the law.

Indeed it seems to have been as a misguided attempt to impress upon Islanders the importance of respecting the law on carnal knowledge (which seems to have fallen into desuetude), that the Ricky Quinn prosecution was undertaken by Constable Cox.

English Penal Law and Island Offences

217. The Court of Appeal did not accept either that the fact that Island crimes such as carnal knowledge of a

child carried only a maximum of 100 days imprisonment under Island law had any bearing on the subject. The Court said that the latter is in no way indicative of a likely sentence of rape. With respect, however the point the Public Defender made was not that the sentence for carnal knowledge was indicative of what an Islander might expect for rape. The Public Defender submitted that it was ironic that the Pitcairn legislature had seen fit to publish offences and penalties for local crimes in the Island Justice Ordinances which were officially published in the Island law books popularly known as the Brown and Black books but, in over thirty years of administration, had not seen fit to publish serious English crimes and the substantial penalties Islanders were subject to under English penal law. It is to be noted that that the Administration saw fit in the Firearms Offences (Prosecution and Punishment) Ordinance 2003 to set out clearly in a schedule the offences, the general nature of the offence, the mode of prosecution and the maximum punishment **(Tab)**.

Evidence from Pitcairners As to Awareness of English Penal Law

218. Whilst there was some evidence called from Mr and Mrs Thomas Christian to which the Court of Appeal drew support for the view that it was known on Pitcairn that sexual offending as a matter of common sense was subject to prosecution under English law, another witness Jay Warren (the current Mayor of Pitcairn and Island Magistrate during the prosecution

of Ricky Quinn) testified he did not know whose law rape would be prosecuted under. He thought rape meant taking a woman by force and would be referred to the administration office for action.

219. Mr and Mrs Thomas Christian, it should be observed, were amongst the older residents of Pitcairn. Indeed, Mr Christian was it would seem on the Island Council when such issues as higher crimes and prosecution was discussed by Commissioner Cowell in 1965. He himself seems to have given some advice on the matter to the Island Council in 1970 when they met and discussed concerns about young people and sexual promiscuity on the Island. He was appraised of aspects of the relationship of English and Pitcairn law on sexual crimes against a child under the age of 12 again it seems by Commissioner Salt as the Supreme Court judgment evidences as late as 13th November 1997, suggesting even then that the law was not clear relating to sexual offending on Pitcairn. Further, Mr and Mrs Christians' home was the subject of referral to the administration for possible prosecution for a burglary in 1971. However, beyond their opinion, there is little evidence that Islanders, either as a matter of commonsense or on the basis of any official instruction must have been aware that rape and other sexual crimes would be prosecuted under English law, still less the nature of the penalties they might be subject to.

220. The last official instruction to the Island on such a matter as the inter-relationship of Island law and "higher authority" and rape in particular, seems to

have been the advices given by Commissioner Reid Cowell and Mr McLoughlin, Legal Adviser under Fiji's administration. Further, as is discussed below under policing even Island prosecutions had fallen it would seem into desuetude on Pitcairn.

Foreseeability of Prosecution

221. The Public Prosecution also accepted that under human rights law prosecution must be foreseeable. *KHW v Germany* (2003) 36 EHRR 59 **(Tab)**. It is submitted that the issue of foresight of prosecution, can raise quite a separate issue from that of accessibility to the law. Were the conditions such on Pitcairn that the Appellants in a practical sense must have foreseen that they would be prosecuted for rape or other sexual offence under English law? It is submitted that in the parlous state of the administration of criminal justice on Pitcairn, from at least 1970 on, if not before, it was not foreseeable that they would be prosecuted for sexual crimes under English law. The Court of Appeal observed:

> The concept of accessibility and foreseeability run together. If a person has no sensible access to the law then it is not foreseeable that the law will be applied to that person. That is where the injustice may lie.

222. It is submitted accessibility to the law and foreseeability of prosecution are not necessarily the same. They do not it is submitted always run together, although they commonly will. The circumstances surrounding the administration of justice on Pitcairn do not point to the conclusion that

it was foreseeable they would be prosecuted under English law for sexual crimes.

223. Aside from the fact that the Sexual Offences Act 1956 was not published on Pitcairn, there was a dearth of evidence that in modern times pointed to the fact that the Administration would prosecute Pitcairners for sexual crimes. There was:

(a) No evidence of any instruction on the subject of prosecution under English law for rape to Pitcairners since Commissioner Reid Cowell's involvement with Pitcairn in 1965.

(b) There had never been a prosecution for an indictable sexual offence on Pitcairn Island.

(c) The only indictable offence prosecuted was that of Harry Christian for murder in 1898 by a Deputy Judicial Commissioner under the West Pacific Commission which was no longer in existence. What the Harry Christian case does, it is submitted, however clearly evidence in so far as the present argument is concerned that authorities since 1898 have been aware that serious crime could occur on Pitcairn and if it did this might involve difficult issues of law, and practice, so that care had to be taken to craft a legal system that would accommodate more serious offending. This point is further taken up under the late constitution of the machinery of justice submission.

(d) Even the Island Court in cases of Island law and carnal knowledge or indecent behaviour offences seems to have been allowed to fall into desuetude by the administration. See the discussion under policing below.

(e) There had never been any British police presence on Pitcairn until Kent Police arrived, in 1996-7.

(f) There existed provision for a Supreme Court under the various Judicature Acts, but in no practical sense was there any machinery of justice for the prosecution of serious crime on Pitcairn.

(g) Even, if murder might have been a crime that would occasion Islanders to expect reaction from the Governor and prosecution by some means, it not does follow that it was foreseeable that sexual crimes would be treated similarly. Indeed, the reaction of Pitcairn Islanders to the investigation and possible prosecution seems to have been one of some general disbelief by women and men of the alleged abuse and the investigation. This point is made by Eva Learner in her social welfare report following a visit to the Island at p7 **(Tab)**.

224. Contrary to the opinion of the Supreme Court that there was a “wealth of historical material” evidencing the fact that English criminal law would be enforced,

on Pitcairn for serious crime, it is submitted there was not. Aside from the advice given by Commissioner Reid Cowell in 1965 there is little further record of advice being given about these kinds of matters from that time on until these allegations arose. These were only isolated or *ad hoc* instances of administrative advice being communicated to Islanders on the topic of prosecution under English law for serious sexual offending and as Simester and Sullivan say **(Tab)** "the criminal law must be organised, ascertainable, system of legal rules – and not ad hoc responses to the conduct of individuals", or as Fuller might say "counsel of expediency".

225. The following submissions on the absence of a British police presence, deficiencies in the Island Court and local policing and the practical absence of the machinery of justice for prosecuting indictable crime, it is submitted compound the problem of the absence of publication of the Sexual Offences Act 1956 on Pitcairn.

THE INADEQUACY OF POLICING AND LOCAL JUSTICE ADMINISTRATION

The Public Defender's Submissions

226. The Public Defender's submissions on policing are recorded in the judgment of the Supreme Court:

> [111] The Public Defender, by way of further submission, contended that until recently there had been no Police or law enforcement personnel from Great Britain

> purporting to uphold English law, especially criminal law, on Pitcairn. The Public Defender argued that whereas Pitcairn had Island Police officers, in reality they were limited in their training and experience to enforcement of local laws administered by the Island Magistrates. It was contended that Island Police officers had no experience in the English criminal law. They could be no substitute for a properly trained and experienced British or overseas Police officer whose presence would serve to emphasise to the local population that Pitcairn was subject to English law, and would constitute a demonstration that in the event of breaches of that law, it would be enforced.
>
> [112] In similar vein, the Public Defender submitted that the absence of English Police officers until 1996 meant that there was little to reinforce in the minds of Pitcairn Islanders (particularly Pitcairn youth) an appreciation that English law could be invoked to prosecute serious sexual offending and that, indeed, the law would be enforced if such offending ever came to notice. With no English Police presence, no indictable crime having been prosecuted on Pitcairn since 1898 and no accessible publication of the English criminal law, how could it be foreseeable, particularly to a young or youthful Islander that he was at risk of prosecution under English law?

The Public Prosecutor's Submissions on Policing

227. The Public Prosecutor submitted in the Supreme Court that the evidence revealed that the roles of the Island Police officer and Island Magistrate have frequently been high profile and that the law has often loomed large on Pitcairn. The Public Prosecutor cited a Western Pacific High Commission administrator who had observed in 1957:

> The function of government in Pitcairn is essentially the maintenance of law and order, and the smaller the community the larger looms the law…

228. It is submitted the reality is very different. The evidence reveals at best a local system of justice that was rudimentary.

229. The Public Prosecutor submissions are recorded:

> [115] The Public Prosecutor responded that notwithstanding the points raised, given the seriousness of the charges, the nature of policing is not a factor that could immunise the accused from prosecution. Once the requirements of accessibility and foreseeability have been met, it must be irrelevant whether particular offences have been detected and prosecuted in the past. There is no concept of estoppel in the criminal law and even if there were such a concept, it could hardly apply to such serious sexual offending.
>
> [116] It was pointed out to us by the Public Prosecutor that the present prosecutions are being conducted in a Pitcairn Court under Pitcairn law following an investigation by Pitcairn Police officers. English law provides the basis for the charges because Pitcairn law explicitly incorporates English law into local law. It would be wrong to view these proceedings as directly involving "English Police" or "English authorities" in those capacities. From the point of view of carrying out inquiries on the Island, personnel from the Kent County Constabulary have been appointed by the Governor as Pitcairn Police officers.

Policing and the Supreme Court's View

230. The Supreme Court made the following findings:

> [113] We accept immediately that there was no professional English Police presence until the visit of Gail Cox in 1996. In exchanges of correspondence and memoranda between officials [para 98] and the Commissioner's office now produced, views have been expressed supporting the appointment of an outside Police officer on account of the fact that Pitcairners appear incapable of upholding or enforcing the law in their own community. An "outside" Police presence would enable a new culture to be embedded.
>
> [117] There is evidence before us to show that historically there has been an Island Police officer present on Pitcairn for at least 70 years. That officer has, since 1950, derived his or her authority from the High Commissioner/Governor. The role has been to enforce all Pitcairn law, including the Pitcairn law that incorporates English criminal offences.

[118] We do not accept the suggestion that Pitcairn may in some way be an anarchic or lawless society. Over the years the roles of the Island Police officer and the Island Magistrate have frequently been of high profile and the law, and enforcement of the law, has loomed large in Pitcairn affairs. Before us were documents extending back 50 years and beyond relating to the duties and responsibilities of Island Police officers, the duties and responsibilities of, and the instructions for Magistrates, the charging of offenders and the conduct of Island Court hearings, the maintenance of records, the reporting to the Administration and matters incidental to the administration of justice.

[119] In our view, although successive Commissioners and Governors have been concerned to promote and ensure the administration of justice on Pitcairn Island to an appropriate level, they have to take into account local circumstances, including what has been seen to be the desire of Pitcairn Islanders to participate in the management of their own affairs to the greatest extent possible. As long ago as 1937, it was observed in a memorandum (nr 2334) of the Western Pacific High Commission (at para 10) that:

The Pitcairners appear to be deeply attached to their present system of Government, and it is their desire that Pitcairners, under the High Commissioner, should rule Pitcairn. This disposes of the often repeated recommendation that an officer should be permanently stationed on Pitcairn. The islanders do not want an outsider and, after reading Mr. Neill's report, I do not think the conditions demand it.

[120] Evidence shows that initially Island Police officers were appointed by the Island community. In the documentation produced are the following:

[a] A letter dated 30 June 1938 from Richard Edgar Christian, Chief Magistrate, to the Western Pacific High Commission advising that Calvert Warren had been appointed as Court Policeman.

[b] A note recording that on 1 January 1940 Henry Young was chosen as Policeman.

[c] A letter dated 10 January 1941 from the Chief Magistrate to the Secretary, Western Pacific High Commission, advising that Burnett S Christian and Calvert A Warren had been appointed Policemen.

[d] A telegram dated 14 June 1941 from the Secretary, Western Pacific High Commission, to the Chief Magistrate as to Police salaries.

These appointments demonstrate the desire of the Pitcairn Islanders to control their own internal affairs, as far as law enforcement was concerned.

[121] The situation changed in May 1950 when an Inspector of Police and Prisons was appointed directly by the High Commissioner. The Inspector was to have control over two Policemen appointed by the Island Council. Mr Floyd McCoy, who was to gain a high profile with regard to policing during the 1950's, was appointed as the first Inspector. During his tenure he became involved in the investigation and prosecution of a number of cases heard before the Pitcairn Island Court, as is evidenced by his reports, and also reports from the on-Island Government Adviser (Education Officer), to the Governor in Suva. He sought guidance as to the approach to be taken with regard to particular offending, the nature and limits of punishment, whether the High Commissioner's Court could be involved in cases of habitual offending and the imposition of more serious penalties.

[122] Floyd McCoy was the prosecutor in 1955 during the trials of a number of Pitcairn Island men accused of carnal knowledge offences involving underage girls. In the case of one accused, Clive Christian, whose offending was more serious, consideration was given to a trial before the High Commissioner's Court on charges under the Offences Against the Persons Act (UK) where the penalty in such a case would be a maximum of "several years" as against three months allowed under Island Regulation 65. This is an example of knowledge by Police on Pitcairn Island that in serious cases resort could be made to English law.

[123] An extract from a Pitcairn Island Administration Report circa 1959 records a request by the Island Police officer, Floyd McCoy, for direct assistance from Suva when investigating offences such as rape and abortion:

<u>FLOYD McCOY RE CORRESPONDENCE</u>
Although this is a chest nut of some maturity, he has found one more point to discuss. He requests if he may address Suva direct where the matter is outside the jurisdiction of the Island Court – e.g., rape, abortion, etc. He was apparently told to investigate such matters by very quiet methods by McCloughlin *[sic]* and feels that should the Chief Magistrate's family be involved he is in a difficult position.

[124] We can see from reviewing the documentation that the standard of policing varied over the years. Nevertheless, successive Police officers were given instructions as to how to carry out their duties and responsibilities by Legal Advisers attached to the Pitcairn Island Administration, whether it was the Western Pacific High Commission or its successors, H E Maude, D McLoughlin and J B Claydon would be included.

[125] A good example is contained in a memorandum to the Chief Magistrate dated 23 December 1953, when the Governor's Representative, Mr Claydon, included the following observations under the heading Law Enforcement:

During my stay I have been forced to the reluctant conclusion that the Island Council is either unable or unwilling to enforce the laws. The Council is the body elected by the people as their local government and one of its first duties is to see that law and order is kept. When I make these statements I do not mean that I expect the Council now to turn round and institute a reign of terror on Pitcairn: that would achieve nothing. What I mean is that if a person flagrantly and wilfully breaks a law, he or she should be brought to account for it and suitably punished. Nor do I wish to imply that from what I have seen on Pitcairn I consider a general state of lawlessness exists. In fact I have found quite the opposite. The people as a whole seem very happy and peaceful: but even in a community of this size you will always get those few individuals who go too far and flout the law openly. It is those individuals whom the Council should keep in check by a sensible and wise application of the laws – and the Governor expects them to do it.

The Inspector of Police is the officer responsible for investigating offences and laying charges, if necessary after consultation with the Chief Magistrate. I have instructed the Inspector of Police to make a full report to Suva in future when any charge is abandoned or not proceeded with in court, and to give reasons why.

[126] It is apparent to us that throughout the 1950's law and order and policing on Pitcairn Island was the subject of regular exchange between the Inspector of Police, the Island Secretary, the Schoolteacher/Administrator, and the British authorities in Fiji. In many cases the cause for these exchanges was offending in respect of adultery, unlawful carnal knowledge, and teenage pregnancy. There were frequent trials before the Island Magistrate. The Inspector of Police was the prosecutor and, in some

instances, periods of imprisonment were imposed within the limits of the Magistrate's jurisdiction.

[127] After 1961, and the coming into effect of the new Judicature Ordinance, records relating to policing are not as extensive as in the 1950's. Nevertheless, there is evidence of continued regular visits to the Island by such administrative officials as R Cowell (1964), Dr Derek Jakeway (1967), Mr Bain (1968), F E Warner and Mr C E Dymond (both 1971). Their reports indicate that during Island visits officials continued to be involved in the giving of legal advice, the explaining of existing laws, the need for new laws or amendments to laws, and the issuing of instructions to Island administrators, including the Police officer.

[128] During the trials before us on Pitcairn Island in October 2004, no evidence was given or adduced that might have assisted us in assessing the effectiveness of Island Police officers during the periods covering the offending by the individual accused.

[129] In a community the size of Pitcairn, issues of law and order and of punishment could not have escaped the notice of the community at large, including the youth as they grew up.

The Appellants' Submissions

231. The Appellants submit that the absence of any British police presence on Pitcairn further compounded the problems associated with the failure to publish English law intelligibly on the Island, and meant that there was a lack of a practical manifestation of an intention to prosecute English criminal law on the Island. It is the Appellant's submission before this Court also by reference to the items of evidence referred to below that, although, not a lawless society, contrary to the view of the Supreme Court and the proposition advanced by the Public Prosecutor, Pitcairn by any modern standards was the subject of a serious deficiency in local policing and in Island Court administration that

diminished the deterrent value policing had for civilian respect for the criminal law.

The Poor Standard of Local Policing and Criminal Justice Administration on Pitcairn

232. The evidence is that the state of policing and the quality of the Island Court was of concern to colonial administrators for many years. Below, reference is made to various documents that refer to difficulties with the Island's local administration of justice and a need for an effective external law enforcement presence on the Island. Whilst Pitcairn was given certain direction in such matters from time to time, it suffered from an absence of effective practical supervision on the Island, and the absence of a resident British police officer or legal officer, if not stationed on a permanent basis, at least visiting on a regular basis. The relevant documents are:

(a) Maude's letter 23 December 1940 to Western Pacific High Commission "hints and Instructions" for the guidance of the local court. In particular, the observation that "the standard of the local court is deplorably low…".

Maude further criticised record keeping on the Island.

(b) Letter to High Commissioner, Western Pacific, Suva, Fiji from Mrs Edna Young, 9 September

1938 listing various complaints, including the prophetic statement:

> … couldn't you send a man here from the outside to replace the native magistrate. Even on so small a place as Pitcairn it takes some education and intelligence to govern the people.

and continuing:

> I simply am interested in seeing this Island bettered so that it will be a pride instead of a disgrace to the crown.

She also stated in her letter:

> I have been in this place over a year and have given this an unbiased attention. I have no ill will to the people but they are such kind hospitable folk that it seems a pity for them to remain in such dire ignominy in such an enlightened world.

(c) Letter to the Secretary, Western Pacific High Commission, Suva, Fiji from Frederick P Ward, 7 June 1942 listing various complaints, and stating:

> … we can see no real improvement, in fact unless and until an officer from outside comes to supervise the affairs of the government on the Island.

(d) Letter 14 November 1950 to Western Pacific from Floyd McCoy Inspector of Police (appointed by Western Pacific High Commission, 30 May 1950) to the Chief Secretary complaining of his conviction for disorderly behaviour. McCoy complained *inter alia* that it was undesirable that what has been set up as a British Court of justice should be

allowed to continue without active and personal supervision to ensure correctness of procedures and interpretation of the law.

(e) Further, Floyd McCoy 14 November to Chief Secretary, Western Pacific High Commission alleged his trial was for a political purpose.

(f) Letter for Advice, to Chief Secretary, Western Pacific High Commission, Suva, Fiji, from Inspector of Police 2 June 1951 who was seeking advice on procedures.

(g) Reply letter of advice from Western Pacific High Commission Suva Fiji dated 8 November 1951.

(h) Further request from Floyd McCoy in these terms: (Report by Commissioner J W Deering)

> He requests if he may address Suva direct where the matter is outside the jurisdiction of the Island Court – eg rape, abortion etc. He was apparently told to investigate such matters by very quiet methods by McLoughlin and feels that should the Chief Magistrate's family be involved he is in a difficult position.

(i) Real disquiet was expressed about the local quality of the administration of justice on Pitcairn (see bundle of documents 23 June 1951 15 October 1951 of the Western Pacific Commission). There is reference to the local court dealing with matters that are “exceedingly parochial”, the returns are

"perfunctory and illiterate", "normal court procedure is almost entirely absent and I should hesitate to bring in a court of the calibre of the Supreme Court of Fiji to deal with the kind of stuff that Pitcairn produces." It was said:

> We are of course entirely dependent on the Chief Magistrate there for what information on Court work we get and on his respect for the High Commissioner's authority for the carrying out of any instructions that may be given to him. We have no means of enforcement.

There is mention of Pitcairn as being a small primitive community.

(j) There is further reference to the fact that we should not have an elaborate structure but we must have a legal structure.

(k) HAC Dobbs to Floyd McCoy, 12 December 1951 inquiring as to whether when in New Zealand he would prepared to take a course of police training, or a course of radio training or both.

(l) Roy Sanders to Mr Dobbs, 14 January 1952 asking whether Floyd could receive training as a policeman, "some part of his course with some knowledgeable country policeman?" In the same letter, is a directive regarding Luxford's Police law in New Zealand, and observations reference and guidance only, as this is certain to lead to further bewilderment.

The intention was to put it in the Courthouse. A direction was sought that it had no interpretation in relation to the Pitcairn Island Regulations 1940.

(m) HAC Dobbs response to Sanders 9 February 1952, affirming a directive relating to Luxford's Police Law would be issued, and affirming he would take up the point about Floyd McCoy's training with a country policeman in New Zealand.

(n) Written memorandum of Western Pacific Commission relating to Floyd's training as a policeman: "We have not heard his reactions. When we do we can approach New Zealand and ask whether he can be given the kind of training suggested 8 February 1952".

(o) Commissioner Claydon's memorandum for Chief Magistrate and Island Council 23 December 1953. "During my stay I have been forced to the reluctant conclusion that the Island Council is either unable or unwilling to enforce the laws".

(p) Legal Adviser Mr McLoughlin in 1958, gave certain instructions as to the procedures to be followed in dealing with offences against the Pitcairn Island Government Regulations. These included instruction on police reporting and court hearings.

(q) A Mr Greenwood, Acting Attorney-General of Fiji, described the Island Court in a memorandum 6 June 1957, "as an Alice and Wonderland Court that under no circumstances should be able to lock people up to a year". He considered fines to be acceptable because they could be repaid in the event of error.

(r) In recent times, the fiasco of the prosecution of Ricky Quinn, and the correspondence over this suggest that matters never improved.

233. See Quinn correspondence:

(a) Letter from Governor Williams to Commissioner Leon Salt 20 December 1999 evidencing awareness that the complainant in the Quinn prosecution was of consent age under Pitcairn law, proceeding notwithstanding.

(b) Report of conviction of Quinn, 21 December 1999 Commissioner Leon Salt to Governor Williams.

(c) Letter Deputy-Governor Wolstenholme to Commissioner Leon Salt 6 January 2000 discussing Quinn's case, the observations on the need for a workable legal system and observations about confusion as to the age of consent.

(d) Commissioner Leon Salt to Meralda Warren, 24 January 2000 critical of her performance as the Island police officer.

(e) Letter by Meralda Warren to Commissioner Leon Salt 11 January 2000 defending her actions.

(f) Letter indicating Mr Quinn has received a pardon from Governor Fell to the Public Defender.

234. Pitcairn was substantially left to its own devices aside from occasional requisitions for advice and instructions given by colonial officers, it would seem from about 1971. The last record of the Island Court proceeding is 2 February 1971 at 7am. The last recorded prosecution of the Island Court until the Quinn case was that of Desmond Christian for carnal knowledge. He pleaded guilty on 24 September 1962 **(Tab)**.

235. After Commissioner Reid Cowell's involvement in Island affairs, there is little evidence of practical guidance being given on matters involving the application of English law, and serious sexual offending. Mr Treadwell unlike his predecessor, Mr McLoughlin from Fiji did not visit the Island in his tenure of the position in almost thirty years. The Commissioner in recent times, Leon Salt was a schoolteacher, and seems to have given advice in the case of Ricky Quinn relating to carnal knowledge of a child as to age and majority which was incorrect

and contributed to Quinn's unlawful prosecution and deportation from the Island. Mr Garth Harraway, a Commissioner before Mr Salt was also a schoolteacher.

236. Mr Treadwell in his evidence stated:

(a) He did not embark on the critical analysis of the existing position on Pitcairn when he took over.

(b) He accepted the Island Magistrate had no training whatsoever in legal process before 1987 or 1990. There was he said in evidence, no attempt to legally educate the Island Magistrate during his term of office.

(c) He supposed that Island records were kept. He did not request to examine these legal records to ascertain whether proper procedures were being carried out on the Island.

(d) He said that the person who was responsible for making sure the proper legal process was being carried on Pitcairn Island during his tenure was the Government Adviser and there were frequent visits by the Commissioner.

(e) He said he really knew nothing about the operation of the Island court. On one occasion he saw a letter from the Commissioner saying to somebody else that

the Island court had only sat on one occasion since 1970. He said he did not think that was correct now. He described the Magistrates court as only a petty jurisdiction.

237. Despite attempts at trial made by the Public Prosecutor to defend the position, the absence of adequate policing on the Island is clear. That this was so was readily perceived by Detective Inspector George**:**

(a) In evidence he agreed that he had recommended the appointment of a community constable from Kent, for limited periods, after he had with Detective Superintendent McGookin in 1996 visited the Island. Detective Inspector George gained the impression on his arrival on Pitcairn that the state of policing on Pitcairn was not good. He recommended the appointment of an independent trained police officer for Pitcairn. It was his view that there should be a retired police officer stationed for 12 months or so who would then be relieved. The recommendation was partly taken up by the appointment of a community police officer for a shorter period.

(b) He also gave the opinion when asked, under cross-examination, that the fact that there was no active role for the Police in the past probably 20 or so years probably reflected the kind of offending that took place. He said that

in his view that the Island police officer was "definitely" deficient. He agreed that if there was going to be any sensible improvement in relation to enforcement of English law on Pitcairn Island, that there required to be a British police presence.

(c) He indicated also, that he was concerned about the possibility of serious crimes happening with guns because he was aware there was an assortment of guns on Pitcairn Island.

(d) He also confirmed that aside from an 18 month gap there had been some British police presence since the time of Gail Cox on Pitcairn Island. He agreed with the proposition that prior to the arrival of the British police in 1996, they did not have the degree of forewarning that if they were to violate English law they stood a good chance of being prosecuted.

238. Further, reference is made again to a draft report dated 2 October 2000 incorporating the findings and recommendations of Eva Learner **(Tab)** in which there was a recommendation that an independent police officer should be stationed on the Island in a permanent way. She described at p4 of her report the nature of policing on Pitcairn as "wholly inadequate".

239. Community Constable Cox was the first such officer to hold this position and was responsible for conducting the prosecution of Quinn before the Island Magistrate. His prosecution for carnal knowledge was no doubt seen as an example to the community. She brought the first copies of *Halsbury's Laws* to be sent to the Island in 1997.

240. The 9 November 1970 meeting of the Council over their concerns for girls and relationships with young males seems to have led to little if any action by administrators. Islanders perceived there to be a problem then. No action appears however to have been taken to warn young Pitcairners, or indeed, generally Islanders of the peril they were in if they engaged in sexual misconduct proscribed under English penal law, and the related penalties for breaking English law. Indeed the report **(Tab)** of Eva Learner highlights the rather dysfunctional appearance of Pitcairn on matters relating to sexual behaviour.

241. What the evidence reveals the Appellants submit is awareness at that time amongst concerned Islanders that there was a perceived laxness in sexual morality amongst the youth of Pitcairn, and that girls might be exposed to this. That was an opportune time to have published at least the English provisions relating to sexual offending on Pitcairn, and the penalties so that Island men and youths were made well aware that England would take the necessary steps to protect women and girls.

242. There seems to be little record of any administrative or police activity in recent years after Fiji ceased to be involved in the governance of Pitcairn until the arrival of the Kent Police in 1997. The Supreme Court referred to the absence of records allowing them to assess the effectiveness of Island police officers during the periods covering the offending. This suggests that there was no prosecution of Island laws on Pitcairn or, if there was, no record of those proceedings, since 1972. Either way, an unsatisfactory situation, and one that should have caused administrators to inquire. In this state of apparent law enforcement vacuum, there was no foundation it is submitted for the Supreme Court to find:

> In a community the size of Pitcairn, issues of law and order and of punishment could not have escaped the community at large, including the youth as they grew up.

The reality it is submitted is quite different.

The Absence of a Police Presence and Estoppel

243. The Court of Appeal on the issue of the lack of a police presence referred with approval to the submission by the Public Prosecutor that the standard of policing on Pitcairn was not a factor which could render these prosecutions an abuse of process. There is no estoppel in criminal law. The Public Defender did not suggest, however, either in the Supreme Court or in the Court of Appeal that estoppel was an issue. His submission was that together with other factors, the absence of any British

police presence was a matter, which could be taken into account on the issue of whether it was an abuse of process to prosecute in the face of the deficiencies in the administration of criminal justice. The point being made by the Public Defender was not as postulated by the Court of Appeal and referred to by the Court as a logical extension of the Public Defender's argument at all namely:

> … the absence of a proper police presence on the island made it easier for serious offences, notably sexual offences, not to be detected/and or prosecuted.

244. The argument is that a British police presence would have demonstrated plainly to Islanders the fact that they were liable to prosecution under English law. The practical effect also is that it would have improved the standards of the very deficient local police. This point was grasped by Inspector George and the Administration and led to the appointment of Constable Cox. There has been a British police presence on Pitcairn in some form ever since.

245. It is submitted that the Court of Appeal incorrectly diminished the importance of a British police presence, on the issues of awareness of the importance of respecting English law in the statement that:

> The presence of a professional police officer would not have any influence on the basic understanding about serious sexual crimes amongst what was essentially a law-abiding community.

246. With respect, a British police presence would have at least heralded to Islanders in no uncertain terms that

their obligations under English law had to be respected or there could be serious consequences for them. It would have assisted to arrest the drift into promiscuity amongst Islanders, such as has been perceived to exist.

Harry Christian and Lack of Police Presence

247. Further, the Court of Appeal appeared also to fuse the issue of Harry Christian and the absence of a British police presence in a way, which was contrary to any submission made by the defence. The Court said:

> Counsel for the appellants submitted that the Harry Christian murder case in 1898 should have provided a timely lesson for the administrators that serious crime could take place on Pitcairn and their practical steps to deal with the possibility, including an educated and effective police presence, should have been taken. On the contrary, in our view, the Harry Christian case, which must be etched into the Pitcairn race memory, clearly demonstrated that English law would apply to those who committed a serious crime. The presence of a professional police officer would not have any influence on the basic understanding about serious sexual crimes amongst what was essentially a law-abiding community.

248. The submission was made by the Public Defender, as here, that Harry Christian was a reminder to administrators that serious crime could take place on Pitcairn as it could take place anywhere and steps should have been taken to put in place adequate procedures for dealing with this after the Western Pacific Commission ceased to exist. A legal system was not however put in place until after the offending had taken place. Whilst Harry Christian being the only indictable case prosecuted on Pitcairn was no

doubt a matter of importance to particularly the older generation of Islanders such as Mr and Mrs Tom Christian, it was a rather extravagant statement, it is submitted for the Court of Appeal to say it was "etched into the Pitcairn race memory". Indeed, Mr Treadwell said in his evidence that in 1987 he had informed the Foreign Office that steps should be put in place to constitute the legal machinery for prosecuting serious crime on Pitcairn Island and despite subsequent follow ups, nothing had been done until recent times.

THE LATE CONSTITUTION OF THE MACHINERY OF JUSTICE

Introduction

249. Although there was provision for the constitution of a Supreme Court in the Judicature Ordinances 1961, and 1970, most if not all of the trial and adjudication machinery and procedures and laws such as Sentencing and Parole Ordinances have been enacted to accommodate these offences after the investigation commenced, and some Ordinances enacted after charge. A list of the Ordinances that have been promulgated to effectively constitute the legal machinery and indeed the legal system to accommodate these trials is set out below. The Appellants submit that administrators should have put firmly in place the machinery of justice after the Western Pacific Commission procedures were repealed so that Islanders were aware not only that they were bound to respect English criminal law, but

that the legal machinery existed for prosecution if they did not and what that machinery was. Further it is submitted they should have been consulted about any proposed legal system that was to be applied to them in relation to the prosecution of indictable crime.

250. In his evidence, Mr Treadwell stated:

(a) In retrospect as at December 1999, the legal system on Pitcairn Island was inadequate.

(b) He admitted to being instructed to work on the legal system from the middle of the 1990s because it was inadequate.

(c) He embarked on the revision of the criminal law in 1997 or 1998.

(d) He admitted that until 1999 and thereafter, there was not really any machinery in place for an indictable trial on Pitcairn. He admitted he pretty well knew that shortly after his appointment.

(e) He said he had made clear representations to the legal advisers at the Foreign & Commonwealth Office in 1987 when he was called there to the fact that these deficiencies really needed to be corrected before there was any out break of serious crime on Pitcairn Island. That was the first time he had approached them.

(f) He said there had been two further follow-ups to the Foreign Office from Deputy Governors, but he did not know if there had been a response.

(g) He commenced to undertake a view of the legal system in 1998.

251. In the present case, problems with venue or forum for trial had to be addressed. A treaty was entered into between New Zealand and England **(Tab)** and legislation passed in New Zealand to enable these trials to take place not only on Pitcairn but elsewhere **(Tab)**. One defendant awaiting trial, Shawn Christian has been extradited to Papakura in New Zealand from New South Wales Australia. He has been on bail awaiting trial since January 2005. He was declined a variation in bail to allow him to return to Australia where he had a job and a partner of some years. Mr Christian has no connection with New Zealand and the alleged crime took place on Pitcairn, where his parents reside.

252. A prison has been constructed to house those who may be convicted and sentenced to terms of imprisonment. It has six cells. It was constructed prior to charges being laid but after investigation had been commenced into these allegations by men on the Island. Since all the men on Pitcairn are engaged in construction it is not unreasonable to infer that some of the Appellants were engaged in the construction of the prison.

253. There have been a very considerable number of Ordinances and legislation passed to implement these series of trials. A summary of the Ordinances is set out below:

Table of Ordinances

Year	Short Title & Description	How repealed or otherwise dealt with
1952	**Interpretation and General Clauses Ordinance**	Now CAP.1
1961	**Judicature Ordinance**	Repealed by CAP 2 of 1970
1966	**Justice Ordinance**	Repealed by CAP 3 of 1999
1968	**Judicature (Amendment) Ordinance**	Repealed by CAP 2 of 1999
1970	**Judicature Ordinance**	Repealed by CAP 2 of 1999
	Justice (Amendment) Ordinance	Repealed by CAP 3 of 1999
1971	**Judicature (Amendment) Ordinance Revised Edition of the Laws Ordinance**	Repealed by CAP 2 of 1999 Spent
1972	**Justice (Amendment) Ordinance**	Repealed by CAP 3 of 1999
	Justice (Amendment) Ordinance	Repealed by CAP 3 of 1999
1999	**Judicature (Courts) Ordinance**	Now CAP 2
	Justice Ordinance	Now CAP 3
	Judicature (Appeals in Criminal Cases) Ordinance	Now CAP 4
	Prisons Ordinance	Now CAP 7
2000	**Justice (Amendment) Ordinance**	Incorporated in CAP 3
	Judicature (Courts) (Amendment) Ordinance	Incorporated in CAP 2
	Justice (Amendment) (No. 2) Ordinance	Incorporated in CAP 3

	Judicature (Appeals in Criminal Cases) (Amendment) Ordinance	Incorporated in CAP 4
	Justice (Amendment) (No. 3) Ordinance	Incorporated in CAP 3
	Evidence (Proof of Written Laws) Ordinance Provides for judicial notice to be taken of written laws	Now CAP 6
	Judicature (Courts) (Amendment) (No. 2) Ordinance	Incorporated in CAP 2
	Justice (Amendment) (No. 4) Ordinance	Incorporated in CAP 3
	Judicature (Appeals in Criminal Cases) (Amendment) (No. 2) Ordinance	Incorporated in CAP 4
	Summary Offences Ordinance Provides for summary offences in the Magistrates Court	Now CAP 5
	Justice (Amendment) (No. 5) Ordinance	
2001	**Legal Aid (Criminal Proceedings) Ordinance** Makes provision in criminal cases for the granting of legal aid	Now CAP 9
	Legal Practitioners Ordinance Makes provision for the admission of legal practitioners and in particular provides that a legal practitioner can hold the appropriate authority from any Commonwealth country	Now CAP 10
	Ordinance to Amend Certain Laws for the purpose of the Revised Edition of the Laws 2001	
	Judicature (Courts) (Amendment) Ordinance Amended the Judicature Ordinance to update the references to Courts in England and Wales in Section 2	Incorporated in CAP 2
	Evidence (Special Measures Directions) Ordinance This provided for special measures directions in evidence in criminal cases for the protection or assistance of disadvantaged witnesses, in line with the Youth Justice and Criminal Evidence Act 1999 (UK)	Now CAP 31
2002	**Annual Revision of Laws Ordinance**	Now CAP 32
	Sentencing (Offences against the Person) Ordinance This reproduces the provisions of section 3 to 10 of the Sentencing Act (NZ) as to	Repealed

the purposes and principles of sentencing with reference to offences against the person, including all sexual offences	
Public Defender in Criminal Proceedings Ordinance Provides for the establishment of the office of Public Defender	
Sentencing (Community-based Sentences) Ordinance This is modelled upon the Sentencing Act (NZ) as to sentences of supervision and community work	Repealed
Parole Ordinance To reform the law relating to the release from detention of offenders serving sentences of imprisonment. Closely based on Parole Act (NZ)	CAP 34
Legal Aid (Criminal Proceedings) (Amendment) Ordinance	Incorporate in CAP 9
Victims of Offences (Ordinance) To make provision for ensuring the rights and protection of victims of crime	Repealed
Sentencing Ordinance To reform and consolidate the law on sentencing. This is based on the New Zealand Sentencing Act	Now CAP 35
Victims of Offences (No. 2) Ordinance	Now CAP 36
Prisons (Amendment) Ordinance Authorises the Government to declare prisons in other countries where a Pitcairn Court is authorised to sit by reason of the Pitcairn (Amendment) Order 2002	Incorporated in CAP 7
Justice (Amendment) Ordinance This ordinance is intended to amend the Justice Ordinance by (i) expanding the language of s24(1) to allow for the sitting of the Court in any place other than the Islands; (ii) replacing s66 of the ordinance with a paper committal; (iii) making necessary provision for the validity of and objections to certain counts in informations filed in the Supreme Court; (iv) prescribing procedure for the preliminary determination of the admissibility of evidence	Incorporated in CAP3
Judicature (Appeals in Criminal Cases (Amendment) Ordinance This ordinance is intended to amend the Judicature (Appeals in Criminal Cases) Ordinance by (i) providing a right of appeal in various important	Incorporated in CAP 4

	preliminary matters arising before trial; (ii) establishing a right of appeal against sentence by the Public Prosecutor; (iii) clarifying the degree of miscarriage of justice to which the provisor to s37(1) of the principal ordinance applies	
	Judicature (Courts) (Amendment) Ordinance Amends by (i) making provision for the formal appointment of registries of the Pitcairn Courts; (ii) prescribing a procedure for seeking a change of venue of any sitting of the Supreme Court or Magistrate's Court; (iii) providing that Court documents and proceedings shall not be invalidated only for a defect or form unless substantial injustice has resulted	Incorporated in CAP
	Bail Ordinance To make provision for bail in criminal cases. This is based on the New Zealand Bail Act	Now CAP 37
	Victims of Offences (No. 2) (Amendment) Ordinance This ordinance makes provisions for ensuring the rights and protection of victims of crime. This is based on New Zealand Legislation	Incorporated in CAP 36
	Judicature (Appeals in Criminal Cases) (No. 2) (Amendment) Ordinance	Incorporated in CAP 4
	Ordinance to amend the Legal Aid (Criminal Proceedings) Ordinance By classifying as to experience and skill	Now CAP 9
2003	**Judicature Amendment Ordinance** To give effect in Pitcairn law to the Agreement between the UK Government and the New Zealand Government signed at Wellington on 11 October 2002 concerning the holding of Pitcairn trials in New Zealand and other related matters	Now CAP 38
	Judicature (Appeals in Criminal Cases) (Amendment) Ordinance This amended the ordinance by repealing s35DD (4)	Incorporated in CAP 4
	Justice (Amendment) Ordinance	Incorporated in CAP 3
	Pitcairn Court of Appeal (Registry) Ordinance	Now CAP 39
	Justice (Amendment) (No. 2) Ordinance	Incorporated in CAP 3
	Legal Aid (Criminal Proceedings) (Amendment) Ordinance	Incorporated in CAP 3

	Children Ordinance	Now CAP 41
	Judicature (Appeals in Criminal Cases) (Amendment) (No. 2) Ordinance	Incorporated in CAP 4
	Judicature (Courts) (Amendment) Ordinance	Incorporated in CAP 2
	Judicature Courts Amendment (No. 2) Enacted on or about 10 November 2003, which gives tenure to the Magistrates and Judges	Incorporated in CAP 4
2004	**Justice Amendment Ordinance** Enacted 2 September 2004 amending the Justice Ordinance by inserting s70CA, 70CB to empower the Supreme Court to direct that evidence be given in criminal proceedings by way of live telephone link. The ordinance is based on s32 of the Criminal Justice Act 1988 (UK) and s51 of the Criminal Justice Act 2003 (UK), the latter of which is not yet in force in the UK	Now CAP 3
	Judicature (Appeals in Criminal Cases) (Amendment) Ordinance Enacted 17 September 2004 this amended the ordinance by repealing s35DD (4)	Now CAP 4
	The Local Government (Special Electoral Provisions) Ordinance 2004 Enacted October 2004 - this ordinance gave a special definition for "conviction" and "convicted" and terminated the current term of office of the Mayor and the Chairman of the Internal Committee	
2005	**Ordinance to amend Judicature (Courts) Ordinance** By amending s11(5) by omitting the words "during Her Majesty's pleasure"	Now CAP 2

254. It is submitted the constitution of a workable system of criminal justice to prosecute Pitcairners should have been implemented after the Western Pacific Commission was abolished and responsibility given to the Governor of Fiji pursuant to the Pacific Order 1952 and the Judicature Ordinance 1961 was enacted. Instead, the instructions were that matters beyond the jurisdiction of the Island Court were to be the subject of communication with Fiji, and little more

was done to constitute the machinery of justice for the prosecution of indictable English crime. After Fiji became independent, and constitutional arrangements were altered under the Pitcairn Order 1970 and the Judicature Ordinance 1971 was enacted, nothing more was done until the flurry of activity attendant upon the investigation and these prosecutions. It is submitted that had the machinery of justice and legal system been in place to prosecute indictable cases, that would have further heralded to Islanders the importance of English criminal law and abiding by it, and would have demonstrated that there was a means to enforce the law.

The late Constitution of the Machinery of Justice and Even-Handed Justice

255. On this point the defence argument was accurately summarised by the Court of Appeal:

> The Public defender submits that the absence of a workable machinery of justice diminished the rule of law on Pitcairn and gave an appearance of expediency and the lack of an even-handed approach to justice. Mr Cato submitted that the administration of criminal justice is a prime responsibility of government and that all the necessary machinery should have been properly in place before the investigations in this matter proceeded. Mr Cato submits that there is an appearance of pre-determination in enacting these provisions during the course of the investigation and indeed, in some cases after charges had been laid.

256. The Public Prosecutor cited *Liyanage v The Queen* [1967] AC 259 (PC) **(Tab)** a case involving "legislative judgments" and argued that this case was

not of that kind. The Public Prosecutor argued that there was nothing that infringed any constitutional limitation on the Pitcairn authorities, nor any Rule of Law. The Supreme Court held that all the Ordinances were of general application and were designed to establish a fair trial process that conformed to accepted human rights standards. They related only to structures and criminal procedure. They were not designed to secure the convictions of known individuals. The Public Prosecutor submitted that the operative principle is that a court system may well be changed. If it is changed, the only question is whether it remains a fair trial. A changed system is not precluded from inquiring into matters that occurred before the changes were made. It was submitted there was no bias, systemic or otherwise. The Supreme Court found that:

> The post 2000 Ordinances are all of general application, are intended to endure indefinitely for all criminal cases and are designed to establish a fair trial process …

257. The Supreme Court described them as neutral between the parties. The Court accepted there were no retrospectivity arguments; nor anything that put the accused at an unfair advantage, nor sought by legislation anything but a fair trial. The Court of Appeal considered that it was significant that there had been no complaint concerning the fairness of the trials. Further, the Court added:

> Nor can it be said that it placed them at any disadvantage in relation to their trials. The essentials of the judicial process were in place prior to the detection of the offences, in that there existed a Magistrate's Court, a

> Supreme Court and a prison. The sheer extent of the alleged offending and the number of accused required steps to be taken to ensure that the justice system could adequately accommodate a lengthy trial involving a substantial number of accused, beyond anything which might reasonably have been contemplated in earlier years.

258. The Public Defender did not advance retrospectivity as an objection nor suggest that most of the changes were other than procedural. It was and is submitted, however that the steps taken to build a prison and the totality of the legislation passed to construct a workable system of justice, extradition, trial and sentence was such that the reality is that it had a crushing appearance. After many years according to Mr Treadwell of notice, that a system had to be put in place to accommodate indictable or serious crime on the Island, the measures taken were plainly directed at the trial of these Appellants, albeit that the system was in place for the future. The Appellants submitted that the late constitution of the machinery of justice and legal system had the appearance that the Administration was determined to secure convictions of these men, and this had the unfortunate appearance of compromising the ethic of even-handed justice. Whilst not denying the need for a mechanism of prosecution and trial to be constituted to enable trials of serious matters in the future that might arise on Pitcairn, it is submitted that these Appellants should not have been put in jeopardy under these procedures enacted as they were in all cases after the allegations leading to charge had occurred, and in some instances even after charge. Indeed, it is submitted that on an issue as important

as the prosecution and trial of serious indictable crimes, Islanders were entitled to be consulted well in advance about the machinery of justice.

259. Contrary to the observation of the Court of Appeal, it is submitted the reality as Mr Treadwell admitted in his evidence, was that there was no legal system in existence for the trial of indictable matters. The Court of Appeal said however that the essentials of the judicial process were in place prior to the detection of the offences, in that there existed a Magistrates Court, a Supreme Court and a prison. The reality is that the Magistrate's Court and Supreme Court existed in name only and the prison was a prison used it would seem in the past to accommodate persons convicted of Island crime and sentenced for short periods of imprisonment. The reality is also as has been considered in the previous paragraphs on policing and local justice administration that local justice has fallen into desuetude for many years.

260. The Appellants further complain that more particular examples set out below involved a direct involvement of the Governor in the trial process as it was developing.

Stays

261. In August 2003, the Judicature (Appeals in Criminal cases) Ordinance was passed providing for appeals against refusal to make orders for staying of proceedings on the grounds of abuse and appeals

against a refusal to give an interlocutory judgment which have the effect of bringing the proceedings to an end. Subsection (4) provided that upon giving the decision which may be subject to appeal, the Supreme Court was to take no further steps for a period of 28 days and thereafter pending any appeal **(Tab)**.

262. This provision was amended on 17 September 2004 by repealing subsection (4) of s35DD **(Tab)**. This effectively removed the stay provision. That was the same day as the legal teams departed for Pitcairn for the trials. Under cross-examination, Mr Treadwell stated that the reason for this amendment was that he thought, if it were not repealed, defence counsel would avail themselves of it and stay the trial.

263. The Court of Appeal addressed this issue asserting that the view of the legal adviser was understandable given the expense of setting up the trial process and the number of people that had to be taken to Pitcairn so that trials could take place.

264. It is submitted though it may be understandable that the administration was anxious to avoid the possibility of trials being disrupted, the late amendment reflects the point that the Public Defender made more generally. The amendment was expedient, and only encouraged the belief that the system was designed to advance the trials to the detriment of the Appellants' rights that hitherto had existed.

The Tenure of Office

265. After complaint had been made by the Public Defender in a pre-trial application but before the hearing of the complaint on 17 November 2003, the Judicature Courts (Amendment) (No 2) Ordinance 2003 was passed on or about 10 November 2003 to give the Judges and the Magistrate tenure of office. Formerly, they had been held at Her Majesty's pleasure. The Magistrate was also the subject of tenure in this amendment. Mr Treadwell explained simply that the matter had overlooked. It did not really arise until the defence asked about it. He said that the change was made in response to the defence objection.

266. The Court of Appeal responded that the change did not affect the ability of the Judges to effect what had been procedural issues prior to the change when they had been carrying out essentially administrative functions. The issue of tenure however it is submitted, is fundamentally important as has been said in *Millar v Dickson* [2002] 3 All ER 1041 **(Tab)**. What this amendment reflects it is submitted is the complaint of the timely absence of consideration of fundamental principles relating to the administration of criminal justice. It is a further illustration of the pitfalls of creating or constituting a legal system in haste. In this regard, legislation was introduced as a consequence of a defence submission made on application to the Court in a pre-trial application and before that application had been adjudicated upon. It had the effect of a legislative judgment.

267. In this regard, it is further submitted that the constitution of the office of the committing Magistrate was at Her Majesty's pleasure (Pitcairn Order 1970, Section 7). It was not until after objection had been taken and written submissions filed by the Appellants at the pre-trial hearing to the status of the Supreme Court Judges that the Judicature (Courts) Amendment Ordinance No. 11/2003 **(Tab)** was enacted to provide that the appointment of the Magistrate also was tenured until the age of 65.

268. It is submitted that not only was this a case of the legislature interfering in the Court process to frustrate arguments that the Appellants had before they had been adjudicated upon, but it was a plain recognition that the machinery of justice had been deficient legally in terms of its constitution.

269. The objection had also been taken to the legality of the committal. It was not suggested that there was anything unfair about the committal, but that Islanders were entitled to an independently constituted Magistrate. The importance of an officer exercising judicial powers being independent had been emphasised by the Privy Council in *Millar v Dickson* and *Starrs v Ruxton* 2000 SLT 42 **(Tab)**. In this case the Magistrate was plainly not independent in the sense of appearance that the law requires. It was submitted that this fact tainted the committal process so fundamentally that the committal was irregular and a nullity. It is submitted that the alteration in the terms of the Magistrates'

appointment to one of tenure could not operate retrospectively to validate what had been done. The only alternative was to recommit and/or obtain the express approval of the Appellants to in effect waive the irregularity. This was not done.

270. The Court of Appeal considered this issue and ruled that the Magistrate was not in fact other than independent in the sense that there was any incentive for him to be influenced in his decisions by policy-driven wishes of the Governor. The committal was not invalid. It is submitted that the terms of his appointment plainly negated his independence from the executive in the way the law requires. There was no obligation upon the Appellants to show actual or potential influence. It is the appearance of justice that was the central issue, and the fact that his appointment could be determined by the executive at any time was a deficient model for the new machinery of justice.

The Deemed Conviction Ordinance

271. Under the Local Government (Special Electoral Provisions) Ordinance 2004 **(Tab)** which was enacted within 2 days of the Supreme Court passing provisional sentences, an extended definition of conviction was enacted by the Governor. This provided that those found by the Supreme Court to have charges of sexual offending proved beyond reasonable doubt were effectively deemed convicted. This was notwithstanding the careful distinction drawn by the Supreme Court between the finding of

charges factually proved and the entering of convictions. This distinction was recognised by the Supreme Court because the so-called "generic argument" which had been advanced by notice to the prosecution and Court in Tahiti shortly before the trials commenced, had not taken place.

272. At the time the argument was first raised, there was a belief, but no substantial evidence, that aspects relating to the legal system were not in place on Pitcairn and the Appellants had grievances. This lead to the Petition for Special Leave being formulated on the basis that there was no evidence of publication of English law on the Island and the complaints in general about the late machinery of justice, and absence of British police presence. However, copies of official documents were received, (and entirely unsolicited and unforeseen) by the defence from an unauthorised source the day before the defence team travelled to Tahiti that suggested otherwise.

273. These documents suggested that the Governor and the Foreign Office were well aware of the deficiencies in the administration of criminal justice on Pitcairn prior to these prosecutions being initiated and that an amnesty had been suggested by Mr Treadwell prior to the decision of Baroness Scotland that there must be legal process. It transpires from the evidence heard before the Supreme Court on the "generic argument" that Mr Treadwell had informed the Foreign Office in 1987 that these deficiencies need to be corrected before there was any outbreak of serious crime on Pitcairn. Subsequently, the

Governor commenced legal action against the person responsible for leaking the documents and was successful in securing the originals. Those documents however, had been widely disseminated including the internet. Some of those documents have been subsequently released by the Governor under disclosure provisions which followed the Judgment of the Board on the Special Leave Application, and have been referred to above. There has been a claim for legal professional privilege for other documents.

274. The Supreme Court granted an adjournment on the "generic argument" so that there could be full disclosure made of documentation pertaining to these issues. The findings of fact and sentence indications that the Supreme Court gave were expressly left open as provisional and did not and could not amount to convictions until the issues relating to the "generic argument" had been heard. However, before the Public Defender had even left the Island, the legislation was passed to effectively remove Mr Stevens Christian and Mr Randall Christian from office. This amounted to a "legislative judgment".

275. Professor Tony Angelo, *The Pitcairn Trials Act 2003* (2003) 21 NZULR 486 **(Tab)** suggests that the ordinance was unconstitutional and *ultra vires* as it breached the Rule of Law and Separation of Powers. The complaint here is that it is a further example of legislative steps being taken before the trial process was completed. The Governor was doing what the

Judges were at pains to stress their unusual procedure was not; that is a conviction of the Appellants. The significance is that if the "generic argument" succeeded the Appellants would have been found not guilty. As it was, certain of the findings relating to offences of indecent assault particularised as sexual intercourse which the defence had indicated to the Court amounted to an abuse of process, were the subject of legal argument at the "generic" hearing and in the light of the finding of the House of Lords in *R v J* [2004] UKHL 43 **(Tab)** which was published after the defence team had left the Island, lead to those charges being dismissed.

276. It is submitted that this shows a pattern of behaviour by the Governor of intervening in matters or issues raised by the defence in an *ad hoc* way as the proceedings were developing. A similar involvement is seen in the case of Shawn Christian in relation to the issue of bail and the offer of a bond by the deletion of any reference to a bond being able to be ordered by the Magistrate in an amendment to the Bail Ordinance. Mr Treadwell stated that this was an oversight but it is to be noted that the amendment took place after the issue of bail and the possibility of a bond to enable Mr Christian to travel back to Australia to live and work had been argued before the Magistrate. It is this, which distinguishes Pitcairn from a jurisdiction where procedures and machinery have been put in place prospectively, in a timely and considered way.

277. The Court of Appeal said in response that the Ordinance did not interfere with the trial process. That may be so, but it certainly illustrated how the Governor whose role it had been to substantially design and create a legal system was prepared to act as though he could anticipate that defence arguments would fail. It is the fact that substantially a legal system had to be created after many years of neglect, of which the Appellants complain. It was through no fault of the defendants that the "generic argument" was delayed and the trial adjourned. Whilst an adjournment may have been desirable and necessary in order to effect disclosure and fully ventilate what the Court of Appeal acknowledged were complex legal arguments, it is submitted the Governor should have been more respectful of due process.

LATE CONSTITUTION OF THE LEGAL SYSTEM AND SYSTEMIC DELAY

278. Before the Court of Appeal it was accepted that the time of complaint of unacceptable delay was between the date upon which the Public Prosecutor formed the view that he would charge the Appellants which was on or about February 2002 and the date of charge April 2003, a period of about 13 months.

279. In the case of the Appellants, the complaint is that they have been under scrutiny, investigation, and prosecution since investigations commenced with the arrival of Kent Police in or about 1996. The focus has been intense given the popular mystique that

surrounds Pitcairn, the small size of the Island with its inter-related and close knit population and community, and in respect of some of the Appellants the leading roles or positions they have held on the Island. The period of delay in charge was attributable to deficiencies of governance of a systemic kind namely the failure to put in place any machinery of justice after the abolition of the West Pacific Commission. The report of Eva Learner NISW Adviser of the 20th of September 2000 at p6-8 **(Tab)** reflects the concern and anguish felt by some of the inhabitants of the Island. Not only is it said "the perception was a general disbelief by the women and men of the community about the nature and extent of the alleged abuse and the investigation. The offenders were in a distinct state of shock and fear". She said, "they were having difficulty in communication, were very weepy, some appeared depressed and withdrawn, they appeared unable to think into the future in any personal sense. One of them was certain he would receive a prison sentence and expressed his fear of being murdered in jail. Another's mother expressed a fear that her son would hang. Others were expressing quiet concern about the number of men to be left on the Island how it would survive".

280. The delays in the resolution of these proceedings have been occasioned in a significant way by the neglect of successive administrations to have implemented adequate machinery for the prosecution of serious criminal allegations arising out of English law. These delays the Appellants contend

were further caused by the decision to import a New Zealand legal system for prosecution and adjudication rather than have the matter prosecuted and judged by English authorities, and a trial take place, if at all, on Pitcairn where they were resident. It would seem the Administration experienced similar doubts as to how to proceed as had occupied the minds of those involved with Harry Christian many years before, and led to the Advice of the Law Officers in 1898.

281. Mr Treadwell was also cross-examined about these matters. In his evidence given before the Supreme Court on the "generic argument" he said that he was commissioned to undertake a review of the whole legal system in probably 1998. He said that it was quickly apparent after the turn of the century what then seemed like the logistical impossibility of holding trials on the Island which he admitted had proved to be wrong that it seemed like the Supreme Court would have no jurisdiction to sit in New Zealand or anywhere else. He agreed that as at April 2002, there could have been trials held on Pitcairn in theory. He further said that it was part of his impression that it was impractical. At that stage, there was still a good deal that needed to be done to the legal provisions to allow for the practical holding of a preliminary enquiry and then always the issues of witnesses, necessary witnesses, who were unhappy or unwilling about returning to the Island, and the question of New Zealand being used and the question of live-link television facilities had not emerged, he thought, at that stage.

282. The delay in charge after it had been explained to the Appellants by the Public Prosecutor that he had formed the view to charge was a serious matter. The delay argument as it manifested itself in the Court of Appeal turned more particularly on the delay in charging the Appellants in April 2003, albeit that the Public Prosecutor had made up his mind on the charges over a year earlier in February 2002. It is submitted that the appropriate response for these delays that are attributable to a systemic failure of governance is to stay these proceedings, and look to the future. The Appellants submit that whereas proof of prejudice may be required to support a stay under English domestic law, where the issue, as here, involves the administration of criminal justice, and the prosecution of the inhabitants of another territory for serious offending under the laws of the governing country, and the delay in doing so is attributable to a systemic failure of governance, the appropriate response is one of stay. This approach is strengthened when the delay is associated with, as here, other serious deficiencies.

283. Difficulties in logistics and administration should not be visited upon the Appellants. The delays were attributable to the ineffective justice administration for many years, and an attitude of administration, which could only be described as lethargic.

284. In this case, it was made plain to Pitcairners that a major investigation was proceeding in 2000. All of the accused in this case were interviewed by

Detective Inspector Vinson and Detective Inspector George between the 12th April 2000, and the 16th November 2000.

285. It was accepted in the Court of Appeal that the wide-ranging nature of the investigation, which involved overseas inquiries, as well as investigation on Pitcairn meant that no complaint could be directed at the period up until the Public Prosecutor had made up his mind to charge in February 2002.

286. The Public Prosecutor announced to the Island at a meeting on 22 October 2001 that his decision to prosecute would be made quite soon after he had returned to Auckland but that an announcement of that decision would be delayed because of other issues, particularly the uncertainty of where any trials might take place. Islanders were informed that if trials were to take place in New Zealand special laws would need to be passed by the New Zealand Parliament to allow that to happen. They were advised at that meeting that he would expect to have his decision on charges by the end of February 2002. He also advised that there were other factors (such as where any trial might be) which were outside his control and which could delay the making of an announcement.

287. The Public Prosecutor informed Pitcairners by recorded video message later on 15 April 2002, that he had indeed made his decision before the end of February, but that he could not announce it, because the question of where trials would be held has still

not yet been finalised. He advised that this required the passing of a special law by the New Zealand Government and was not anything he had control over. He added that senior Government officials in both New Zealand and the United Kingdom have been working hard since he returned from Pitcairn with a view to getting those laws passed. So no blame can be attached to anyone. This was a very complicated and unique situation and so, no one, anywhere in the world, had experience of anything similar. He informed Pitcairners there would be prosecutions, but could not inform them until it was certain where those charges would be heard.

288. Various possibilities were outlined. One option, which was possible he said, was through video link for trials to take place with connections in both New Zealand and Pitcairn Island. In other words, some of the people involved in the trial might be able to stay on Pitcairn while the Judge and lawyers would be in New Zealand and all of them connected by video. There were other options and what would ultimately happen would be up to the Judge assuming the necessary laws were passed.

289. The Public Prosecutor expressed the view that at least some of the earlier uncertainty and anxiety would be reduced by what he had said. However he noted that he was aware that what he had said would give rise to other questions which they would have not all of which he could answer at that stage. He advised that he would inform those affected first.

290. Charges were ultimately laid against the Appellants in April 2003, at Adamstown. The trials were held in September 2004 on Island and completed on 24 May 2005 with the publication of the judgment of the Supreme Court on the promulgation and related issues.

291. There has been an unacceptable delay between February 2002 when he had made up him mind on charges and charge in April 2003, at Adamstown. Contrary to the opinion expressed by the Public Prosecutor that nobody was at fault, the Administration plainly was. There had been a serious failure in governance to provide Pitcairn with a workable system of justice for many years, after the Western Pacific Commission had been abandoned. Although the investigations required travel and co-ordination, it seems that they were completed by the time the Public Prosecutor spoke with the Island and further delays were systemic.

292. In *Howarth v United Kingdom* 31 E.H.R.R. 861 **(Tab)**, the European Court found that there was no indication that the Appellant was responsible for the time taken to deal with the appeal and that no convincing reasons had been given which would justify the delay. It is submitted that this is one of those cases where a stay is in order because the delay in charging the Appellants came within either an exceptional category as referred to by Lord Bingham in *Attorney-General's Reference No 2* at paras 24-25 **(Tab)** or was an appropriate response to the delay following the approach of Lord

Hope In *HM Advocate v R* [2004] 1 AC 462 at para 76 **(Tab)** because central to the problem was a systemic failure of governance. It is submitted that in the modern day, deficiencies of governance whereby the Appellants were left to contemplate their fate for at least 13 months on Pitcairn, an isolated Island in the eastern part of the South Pacific is unacceptable.

293. The Court of Appeal preferred the submissions of the Public Prosecutor. The Public Prosecutor had contended that the delay had occurred because of the number of accused and the unique circumstances, which resulted. The Public Prosecutor had contended that if there had been only one or two accused the charges could have been laid much earlier but given the circumstances it was appropriate to delay while options for trial venue were considered and in particular enabling a venue to be chosen so that all accused could be tried at the same time. The Public Prosecutor contended that the treaty saved massive delays, which would have occurred had there not been provision for procedural or substantive hearings to take place in New Zealand.

294. The Appellants, however, contend that the communities interests must be balanced by the interests of the individual, *HM Advocate v R* at para 76 **(Tab)**. In an ordinary case where adequate trial procedures and a competent legal system are in place; where the delays are attributable to a complete absence of administrative foresight, or inaction it should be otherwise. It is submitted that

once the Pacific Order procedures were abolished, then the system should have been put in place to accommodate indictable crime.

295. It is accepted that there was no prejudice to the Appellants of the kind that prevented a fair trial being had. However there was a considerable prejudice of a wider kind as is submitted above. To live in a small Island community under a real threat of charge for so long is a serious issue. The Appellants should not have been left in this state of uncertainty for so long without charge, whilst decisions were being made about the venues for trials and related issues, by the Governor and Foreign Office. The timely constitution of the machinery of justice and a legal system would have avoided this and additionally, it would have provided Pitcairners with advance notice that English criminal law would and could be enforced if the need arose.

296. A stay of these proceedings and the quashing of these convictions will forever be a powerful reminder down through the ages to those who in the future have the responsibility for the administration of criminal justice that it is a serious matter.

297. Whilst in defence or by way of explanation or excuse for the absence of a more active involvement in the administration of criminal law on Pitcairn, it may be argued that Pitcairn was a sparsely populated and isolated territory, with at times little apparent demand for a more active presence than an Island Magistrate and Island police, the decision to prosecute for

English crimes in the face of these known serious deficiencies in the governance of Pitcairn in terms of law and order is not, it is submitted, defensible. The paucity of resources spent on law and order in past times is to be compared with the resources spent in recent times, and further demonstrates clearly what could have been done under more vigorous governance.

The Delay in Appointing the Public Defender

298. A facet of the late machinery of justice is also the fact that the Public Defender was appointed to office long after the appointment of the Public Prosecutor. During the course of the Governor and Foreign Office considering whether it should proceed by legal process or by some informal means such as an amnesty, there was no input into this decision by an officer responsible for the interests of potential accused and the wider Pitcairn community. That an amnesty had in fact been adopted as a reasonable approach to the stealing of government property on Pitcairn appears in the report of Eva Learner at p3 **(Tab)**. Mr Treadwell had in fact recommended such an approach as a result of a belief that offending was wide spread and culturally based. It is submitted that had the Public Defender been appointed earlier, and been given access to information of the kind that has been evidenced in these proceedings, that he could have made a meaningful contribution to the decision as to whether in all the circumstances it was appropriate to prosecute men for indictable offences on Pitcairn.

THE LEGALITY OF THE IMPORTATION OF THE MACHINERY OF JUSTICE AND A LEGAL SYSTEM THAT WAS IN SUBSTANCE A NEW ZEALAND LEGAL SYSTEM

299. It is submitted that the implementation by legislation and an Order in Council (UK) of a Treaty between England and New Zealand to create a Court of Pitcairn Island based in Papakura, New Zealand, and to provide a venue for the trials of Pitcairners resident in New Zealand, and elsewhere, and the extradition to Papakura from foreign countries and within New Zealand is exceptional in the domestic administration of criminal justice. The case did not involve war crimes or interstate crimes involving terrorism, such as *Lockerbie*. It is accepted in so far as this was achieved by legislative act of parliament, this cannot be challenged. However, it provides a unique background to further action, which is challenged as an abuse of power of governance namely the effective delegation for the machinery of justice from England to New Zealand.

300. The Appellants submit in this respect that not only did they have no adequate notice of English criminal law, the penalties for violation of English laws, or sufficient general notice communicated to them of an English intention to prosecute such activity, but they also had no notice either that the law would be enforced by importing in “substance” a New Zealand legal system for their prosecution and trial of crimes under English law. The Appellants submit that they

should have been prosecuted by English prosecuting officers and tried by English Judges competent to try such offences under English law and not by functionaries who were not English, but constituted as Pitcairn lawyers or Judges under subordinate legislation.

301. It is submitted that these steps denied the Appellants access as British subjects to the British legal system in terms of their prosecution and the adjudication or trial of the offences under English law.

302. If, as the Law Advice on Harry Christian stated in 1838 the leading inhabitants of Pitcairn had submitted to Her Majesty's Sovereignty, then there was, it is submitted, a reciprocity of expectation that indictable matters involving English crimes insofar as they were applicable to Pitcairn would be determined by English functionaries, or functionaries within the British sphere of influence and control, and they would not be answerable to functionaries appointed from a foreign country. It is submitted that analogous was the position of the Greater London Council viz a viz its rate payers described by Lord Wilberforce in *Bromley LBC v Greater London Council*, [1983] AC 769 at p815 **(Tab)** as a fiduciary relationship. In this case, although the Governor was English, many of the personnel constituting the administration were English, and those who investigated the cases were essentially police from Kent, the very important responsibility of prosecution and adjudication and for that matter their defence was effectively delegated to New Zealand. Even the lawyers selected to

represent the Appellants during police interviews were New Zealanders, later appointed as Pitcairn legal representatives under Ordinance, and not English barristers who might have been expected to have provided better educated advice on PACE requirements. All this was effected without any apparent advance consultation with Pitcairners and as a matter of convenience, it seems, once it had been decided prosecutions could follow the investigation.

303. The complaint here is not that the Governor did not have the right to make laws relating to the machinery of justice and the constitution of a workable legal system. The Court of Appeal was created by Order in Council in 2000. It is conceded that the Governor had wide powers to legislate and similarly wide powers of appointment to office. *Ibrelebbe v The Queen* [1964] AC 900, at 923 **(Tab)**, 'the widest law-making powers", but to adopt the colourful phrase of Laws LJ in *R (Bancoult) v Secretary of State for Sovereign and Commonwealth Affairs* [2001] QB 1067, at 1103 **(Tab)** "every tapestry has a border". *Bancoult* was a case involving a different aspect of governance and the attempt to displace an indigenous people from their land for a reason which could not be said to be necessitous, but is it any less serious to divest a British subject charged with a very serious crime under the governing law of England from access to the British legal system when England has accepted sovereignty over that territory?

304. It is submitted that the Governor abused his power in the sense that he either acted invalidly or unreasonably in the meaning given to this expression by Lord Wilberforce in *Bromley LBC v Greater London Council* [1983] AC 769 at p813 and Lord Scarman at p836 **(Tab)** by in particular delegating the power of prosecution and trial to New Zealand Judges with the Court of Appeal constituted by New Zealand Judges also. It is submitted further that this deprived the Appellants also of the sentiment behind Chapter 29 of Magna Carta which provided that "a free man should not be taken or imprisoned … nor should he be condemned but by lawful judgment of his peers ….". It is submitted that New Zealand functionaries were not the Appellants' peers.

305. The submission is made that whilst from time to time *ad hoc* appointments are made to courts in overseas jurisdictions of New Zealanders, without objection, here there was an entire delegation of the legal machinery of justice to the responsibility of New Zealand officers. Aside from the Office of Public Prosecutor and the Judges, there was also a Sentencing Ordinance and a Parole Ordinance culled from New Zealand precedent, and other procedures taken from New Zealand, effecting an unusual hybrid of English penal law and New Zealand sentencing law and other procedures. No doubt it is submitted that the implementation of New Zealand based procedures and practices such as the Sentencing Ordinance was because the legal adviser was a New Zealander and the Judges were from New Zealand.

306. In any event, it is submitted that radical steps such as these if within, the Governor's power to effect, should not have been taken without advance consultation and approval of Pitcairners.

307. This argument was raised in the Court of Appeal for the first time. The Court observed that the submission was without merit. The basis for this reasoning was that there was no apparent limit to the Governor's powers to appoint to judicial and other relevant office whomsoever he chooses under relevant Ordinances (other than the Judges of this Court) who must have certain qualifications. The point was made that there had been no complaint about the way in which the Supreme Court judges had discharged their duties, which the Court considered added to the unreality of this situation.

308. It is accepted there was no complaint about the discharge of the judicial functions. The argument was not about this. It was about the principle and validity of the appointment of the entire machinery of justice and functionaries from New Zealand. Taken individually, there may be no objection to what was done, but when considered in its totality, responsibility for prosecution and adjudication and defence was passed to New Zealand.

309. Although Pitcairn may have certain modern day connections with New Zealand, no compelling reason has been advanced why the functions of prosecution and adjudication were passed to New Zealand. The

police who investigated were from Kent, and the police who attended the Island for trial and after were Ministry of Defence police. There is no apparent reason either why sentencing could not follow English practice or law given English criminal law was being prosecuted, under English governance. In this regard, in at least the case of the Appellant, Len Brown, an old man a sentence of a suspended kind available under English law but no longer available under New Zealand law would have practically been more appropriate than a sentence of imprisonment with leave to apply for home detention, on the Island.

310. It is speculation to consider, as did the Court of Appeal based on arguments of convenience raised by the Prosecution as to why it was determined to so heavily draw on New Zealand resources, and authority. Request has been made both of the Governor's office and the Foreign office why it was decided to proceed in this way and in particular appoint a New Zealand Prosecutor and New Zealand District Court Judges to try these matters. Legal professional privilege has been claimed by the Governor in recent correspondence as to the reasons why this was done.

311. Is it good enough in the modern age that Pitcairn defendants charged with offences carrying life imprisonment were tried by Judges who were not competent to try life cases in New Zealand? They were Judges admittedly familiar with sexual crimes, and no criticism is made of their conduct of the cases, but as a model in today's world is it

acceptable, where English law is being prosecuted and a defendant is exposed to such condign sentences that Judges of any lesser standing than an Englishman could expect to be tried by should be appointed and those from a country to whom he owes no allegiance? Is this an expression of that reciprocity of expectation between lawgiver and subject that Professor Lon Fuller speaks of when he talks of reciprocity being part of the idea of a functioning legal order?

312. It is true that Harry Christian was tried by an Assistant Judicial Commissioner from the West Pacific Commission, under the Pacific Order 1893, with assessors, not a Judge. He was convicted of murder on Pitcairn, sentenced to death and hanged in Fiji. The Western Pacific Commission that was responsible for his trial was a British institution.

313. It is submitted that delegation of the powers of prosecution and adjudication to New Zealand and the implementation of Ordinances that largely embodied New Zealand practice and on the scale here was exceptional, unnecessary and an *abuse* of the power of administration. There must it is submitted be a necessity demonstrated for this to legally be effected. If the Public Defender is wrong on this point and the Governor had the power to do what he did, then it is a factor still to be taken into account when considering the overall propriety or justice of commencing these proceedings that Pitcairners knew nothing about all this before the

investigation was commenced, and the legal system for prosecution was constituted.

PART V - FURTHER LEAVE

THE ELEMENTS OF FORCE OR RESISTANCE UNDER THE SEXUAL OFFENCES ACT 1956

Rape - whether Submission and an Absence of Proof of Force or threat of Force is sufficient to constitute Rape under the Sexual Offences Act 1956

314. The submission is that the Appellant, Stevens Raymond Christian, was insofar as the allegations relate to a period before 1976 entitled to a direction and consideration of the law as it was applied in terms of the directions given in *Morgan v DPP* [1976] AC 182 at 186 **(Tab)** and the definition of rape therein stated by the Trial Judge which referred to force as an essential ingredient of rape.

315. The complaint relates to Charge 9 and it is submitted that the evidence does not disclose the use of force or threat of force.

316. The argument is that under English law at the time of the offending, rape involved force or the threat of force and in the absence of proof of force or resistance, a conviction could not be entered. English authorities on point besides the trial direction are: *Morgan v DPP* and Lord Hailsham at p210, lines F to G **(Tab)**; R v Harling (1937) 26 Cr App R 127 at p128 per Humphries J affirming the direction of the

trial judge Hilbery J **(Tab)**; Lord Chief Justice Parker in *R v Howard* (1965) 50 Cr App R 56 at 58-59 **(Tab)**; *R v Lang* (1976) 62 Cr. App. R.50 **(Tab)**

317. Submission could not be treated as evidence of non-consent unless the complainant was a child of tender years; *R v Howard* at p58 **(Tab)**. Cases involving insensible complainants or those whose consent had been fraudulently induced are it is submitted in another category and were not relevant.

318. The Public Prosecutor contended based upon certain statements expressed in the *Helibron* report, and some older English authority that the common law as at the time of this offending did not reflect such a view. It is submitted that English practice at the time of the offending was to the contrary and it did not change until the 1976 amendment was effected and in the light of the statements of the Court of Criminal Appeal in *R v Olugboja* (1981) Cr App R 443 at p446 **(Tab)**. See further *R v Malone* [1988] 2 Cr App R 447 **(Tab)**.

319. It is submitted that there was no evidence of force or threats of force associated with the complaints. Nor at the time of the offending was she a child of tender years whose submission could be treated as non-consent. It is further submitted in response to the case of *R v R* (1991) 93 Cr App R 1 **(Tab)** cited by the prosecution at authority for the proposition that a later approach to the law could be imposed in relation to earlier offending that the definition of rape

is material to the crime itself and not a defence by way of immunity.

DATED at Auckland this 7th day of June 2006

Paul Dacre
(Public Defender)

Charles Cato
(Counsel)